Due service and receipt of a copy of the within is hereby admitted

this _____ day of March, 1938.

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Attorneys for Cross-Respondent.

In the Supreme Court of the United States

October Term, 1938

No. 15.

WAIALUA AGRICULTURAL COMPANY, LIMITED, an Hawaiian corporation,
Petitioner,

vs.

ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, JAMES L. HOLT, and ANNIE HOLT KENTWELL,
Respondents.

Brief of Waialua Agricultural Company, Limited.

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1928 April 5—First claim made against Waialua that deed was invalid (R. 847).

May 8—Suit filed (R. 2).

1929 May 11—Trial Court files decision cancelling deed (R. 111).

1931 April 18—Supreme Court of Hawaii files decision affirming cancellation and reversing money judgment and remanding cause (R. 202).

1932 Aug. 18—Trial Court files decision on remand trial cancelling 1905 lease and 1906 contract (R. 472).

1934 May 3—Supreme Court of Hawaii files decision cancelling deed but denying cancellation of 1905 lease and 1906 contract (R. 547).

1937 Dec. 9—Circuit Court of Appeals decision (R. 1586).

1938 Feb. 1—Circuit Court of Appeals decision denying rehearing (R. 1633).

May 2—Certiorari granted.

In the Supreme Court of the United States

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No. 15.

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ELIZA R. P. CHRISTIAN, an incompetent person, by HERMAN V. VON HOLT, her guardian, JAMES L. HOLT, and ANNIE HOLT KENTWELL,
Respondents.

Brief of Waialua Agricultural Company, Limited.

This cause is here on writ of certiorari to review a decree of the Circuit Court of Appeals for the Ninth Circuit which cancelled a deed (executed in 1910) upon the ground of the mental incompetence of the grantor. The decree also directed the cancellation of a lease (executed in 1905) and contract (executed in 1906), if it should be found on remand that the maker was incompetent at the time of their execution.

The cause reached the Circuit Court of Appeals by cross appeals from a decree of the Supreme Court of the Territory of Hawaii cancelling the deed, but holding the lease and contract valid irrespective of the mental capacity of the maker.

OPINIONS BELOW.

Opinions of the Circuit Court of Appeals:

93 Federal(2d) 603 (R. 1586)

94 Federal(2d) 806 (Denying Rehearing, R. 1633)

Opinions of the Supreme Court of Hawaii:

31 Hawaii 817 (R. 202)

33 Hawaii 34 (R. 547)

Opinions of the trial court (unreported):

Opinion of May 11, 1929 (R. 111)

Opinion on Remand Aug. 18, 1932 (R. 472)

JURISDICTION.

The decree of the Circuit Court of Appeals was entered on December 8, 1937. A petition for rehearing was denied on February 1, 1938.

The petition for a writ of certiorari was filed in this Court on March 30, 1938. The order allowing certiorari was filed on May 2, 1938.

NOTE:

For convenience Waialua Agricultural Company, Limited is referred to as Waialua.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. §347).

The jurisdiction of the Circuit Court of Appeals for the Ninth Circuit is based on Section 128(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. §225), which gives that court appellate jurisdiction to review final decisions of the Supreme Court of the Territory of Hawaii in all civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5,000. The jurisdictional amount is shown by the record. (R. 791)

STATEMENT OF THE CASE.

The question presented here is whether a lease, a contract and a deed of land in the Hawaiian Islands should be cancelled upon the ground that the lessor and grantor (Mrs. Christian) was mentally incompetent when they were executed. The lease was made in 1905, the contract in 1906, and the deed in 1910. This suit was filed in 1928 in the Circuit Court of the First Circuit of the Territory of Hawaii (hereafter called the trial court), Mrs. Christian having been placed under guardianship in England in 1926 for the first time, at the age of 40 years. (R. 843, 847)

The court below (the Circuit Court of Appeals) decreed the cancellation of the deed (although it found that Waialua took without knowledge of the incompetence), on the ground that the deed of an in-

competent is void and should be cancelled upon the return of the money paid with an allowance for improvements. It similarly decreed the cancellation of the lease and contract, if it should be found on remand that Mrs. Christian was incompetent when they were executed. (R. 1628)

We contend that none of these instruments should be cancelled, because the deed or contract of an incompetent is voidable, and not void, and will not be set aside as against an innocent purchaser when the deed or contract has been fully executed, as is the case here. We further contend that even if this Court should determine that the applicable rule is that the deed or contract of an incompetent, while voidable and not void, will be set aside if the parties can be restored to status quo, that these instruments should not be cancelled because it is impossible to restore status quo.

The property in question is a one-third interest in 14,000 acres of land on the Island of Oahu, in the Territory of Hawaii, referred to in the opinion as the Holt lands. These lands are shown on the attached map, and lie in the form of a wedge in the center of Waialua's plantation, comprising 28% of its entire area. (R. 843)

Mrs. Christian's interest in the property, when the lease was executed in 1905, and the deed in 1910, consisted of a one-third contingent remainder dependent upon her surviving her father and being his sole heir. Her father died in 1922, whereupon the fee vested. (R 953)

The lease was executed in 1905 for a 25-year term, at a time when the land was a barren waste. The lessors consisted of the administrator of the Holt estate, all of the owners of vested rights, and the life tenants; and the contingent remaindermen, including Mrs. Christian, joined in the lease. Mrs. Christian's father, her cousins and other relatives were among the lessors. (R. 367)

The deed (which conveyed Mrs. Christian's one-third contingent remainder in the property covered by the lease) was executed in 1910. Her father and her cousin joined in the deed as to their interests in the property. (R. 27)

The contract was executed in 1906. By it, Mrs. Christian assigned to her cousin, Mrs. Kentwell, the rentals to become due to Mrs. Christian (contingently), under the 1905 lease, as well as other rentals which might thereafter accrue, in consideration of Mrs. Kentwell's agreement to support Mrs. Christian during her life. (R. 386) Waialua succeeded to Mrs. Kentwell's interest under this agreement by the deed of 1910 to which Mrs. Kentwell was a party.

Mrs. Christian left Honolulu in 1906, accompanying her father and cousin Mrs. Kentwell. After three years spent in eastern United States, they went to Oxford, England, in 1909, where they have since resided.

In 1926 (21 years after the lease, and 16 years after the deed) Mrs. Kentwell was appointed Mrs. Christian's guardian in England. This is the first time any

incompetency proceedings had been brought against her. It was not until April, 1928, two years later, that notice was first given Waialua that it was claimed that the deed was invalid. Suit to cancel the deed was filed in the same year. (R. 847)

Proceedings in the Lower Courts.

The trial court found that Mrs. Christian was mentally incompetent when the deed was delivered and decreed its cancellation. It also entered a judgment against Waialua of $540,906.07 for use and occupation of the land.[1]

From this decree Waialua appealed. The Supreme Court of Hawaii affirmed the cancellation of the deed, but reversed[2] the money judgment. This reversal was upon the ground that by the lease of 1905 Waialua had leased the lands in question for a 25-year term; that Mrs. Christian had joined in the execution of the lease; that its validity was not in issue and had not been adjudicated (R. 313); that it was therefore error to enter a money judgment for use and occupation. The court also held that the validity of the 1906 contract, assigning rents under the lease and other rents to accrue to her, and to which instrument Waialua had succeeded, had not been in issue and if valid would also protect Waialua against a money judgment. (R. 322)

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1. The opinion of the trial court (R. 111), Opinion on Accounting (R. 163), Decree (R. 186, Oct. 16, 1929).

2. (R. 202, May 12, 1931.)

The Supreme Court of Hawaii thereupon entered an order (R. 326) remanding the cause to the trial court to permit amendments of the pleadings to put in issue the validity of the 1905 lease and the 1906 contract.

Thereafter, by amendment (May 22, 1931, R. 331) the petitioner attacked the validity of these instruments on the ground of the mental incompetence of Mrs. Christian. Thus it was not until 1931, and after the 25-year term of the lease had expired, that it was first challenged. On remand the trial court refused to permit Waialua to introduce evidence on the issue of the competence of Mrs. Christian in 1905 and 1906, when the lease and contract were executed (the deed previously attacked was executed in 1910), holding that the incompetence of Mrs. Christian had been adjudicated in the first trial. On the conclusion of the trial, the court ordered the cancellation of the 1905 lease and 1906 contract upon the ground that Mrs. Christian was mentally incompetent when she executed them, and directed a judgment against Waialua for $606,785.75. (R. 472)

From this decree Waialua appealed to the Supreme Court of Hawaii which reversed the decree of the trial court. It held that Waialua should have been permitted to introduce evidence on the issue of incompetence in 1905 and 1906, but that this was harmless error as the two instruments should not be set aside even though Mrs. Christian was incompetent when she executed them. It further held that Waialua was not liable for use and occupation and reversed the

money judgment. (R. 547) A decree was entered cancelling the 1910 deed, but upholding the 1905 lease and 1906 contract. (R. 631)

Both parties appealed from this decree, to the Circuit Court of Appeals—Waialua from that portion cancelling the 1910 deed. and Mrs. Christian from that portion holding valid the 1905 lease and 1906 contract.

The Circuit Court of Appeals decreed the cancellation of the 1910 deed, and remanded the cause to determine whether Mrs. Christian was incompetent when the 1905 lease and 1906 contract were made. with directions to cancel these instruments if Mrs. Christian were found to be then incompetent. (R. 1586)

The cause is here on certiorari, to review the decree of the Circuit Court of Appeals, Waialua's petition for a writ having been granted on May 2, 1938. A cross-petition by Mrs. Christian was granted on the same day.

ERRORS RELIED ON.

The Circuit Court of Appeals erred in:

1. Holding the deed of 1910 void; and the lease of 1905 and the assignment of 1906 void, if the grantor was then incompetent, and directing their cancellation.

2. Holding that Waialua can be restored to status quo; and that it is restored to status quo by a return

of the purchase price plus an allowance for improvements.

3. Giving no consideration to the fact that Waialua purchased a contingent interest, and that the contingency did not occur until 12 years later; or to the fact that costly improvements were made off the land for its benefit, and on the land for the benefit of other lands.

4. Holding that the equities of the parties should not be balanced; and in refusing to balance such equities.

5. Holding that Mrs. Christian is entitled to recover the rental value of the land for the period, or any part thereof, of Waialua's occupation.

SUMMARY OF ARGUMENT.

1. The Circuit Court of Appeals erred in not holding the instruments valid and unassailable. Waialua having taken in good faith without notice of incompetence for an adequate consideration. The proper rule is that deeds and contracts of incompetents are valid if made with an innocent purchaser for an adequate consideration.

2. Even under the view that the deed of an incompetent may be set aside as against an innocent purchaser, if status quo can be restored, cancellation should not be decreed here because status quo cannot be restored.

3. The grantor's attempt to sustain the erroneou decree of the Circuit Court of Appeals cancelling th 1910 deed on grounds other than those relied on b that court, is without merit.

ARGUMENT.

The Circuit Court of Appeals said:

> "Both courts found that appellant (Mrs. Christian) was incompetent to execute the deed: that the company (Waialua) had no notice of the incompetency: that the company could be placed in statu quo: and that appellant was not guilty of laches. These conclusions were reached after careful consideration of the evidence. Exhaustive opinions were written concerning the evidence. We accept them because we can not say there was clear error, since the evidence at most was only conflicting." (R. 1605)

These findings are findings of fact only with respect to the questions of incompetency and lack of notice. The finding that Waialua can be placed in status quo, as will be hereafter pointed out, is not a finding of fact, but a decision on a question of law. The question of laches, while often considered a question of fact, because determined in each particular case upon the facts and circumstances there involved, is, we submit, in this case, where there is no dispute as to the pertinent facts, also a question of law.

Although we believe that Mrs. Christian was competent to execute the instruments in question, we do

not ask this Court to examine the mass of conflicting evidence bearing on that question, and for the purpose of this review we do not challenge the finding that she was incompetent to execute the 1910 deed.

As the Circuit Court of Appeals points out, both lower courts found that Waialua had no notice of the incompetence. This was a question of fact, and as all of the courts concur in this finding, we will not burden this argument with discussion of the reasons supporting that finding.

The Supreme Court of Hawaii found that the consideration paid by Waialua was adequate (R. 304) and the Circuit Court of Appeals proceeds upon this assumption.

Our argument will therefore treat the following facts as established:

1. That Mrs. Christian was incompetent when she executed the various instruments (though as to the 1905 lease and 1906 contract, no trial has yet been had on that issue; and if this Court does not sustain our contention that her mental competence when she executed them is immaterial a further trial will be necessary to pass on that issue of fact):

2. That Waialua had no notice of her incompetence.

3. That Waialua paid an adequate consideration.

However, as the facts respecting Mrs. Christian are important to a proper understanding of the issues to be argued, they will be dealt with in our discussion of the facts.

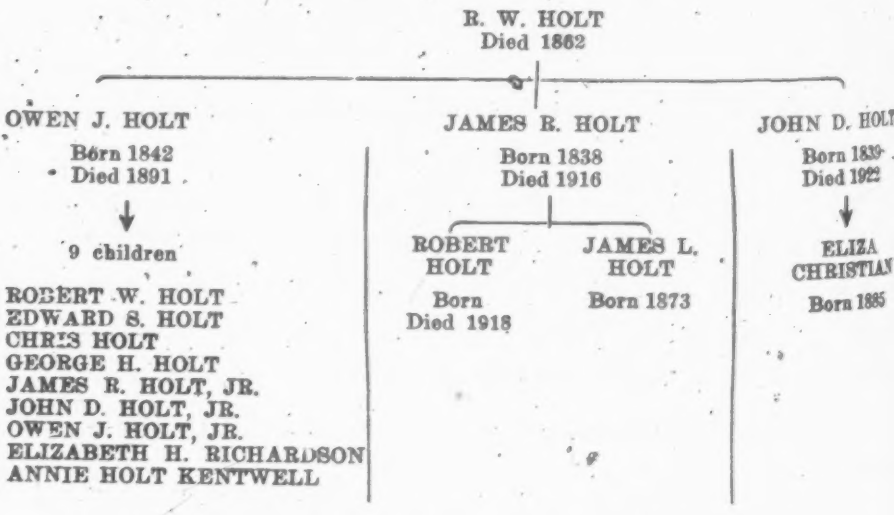
For convenience, a chronological table of facts has been inserted at the beginning of this brief.

THE FACTS.

Mrs. Christian's Family and Early Life.

Mrs. Christian was born at Makaha in the Hawaiian Islands on December 30, 1885. Her mother, a native Hawaiian, died when she was seven years of age. Her grandfather, R. W. Holt, was an Englishman who married a native Hawaiian. (R. 844)

Mrs. Christian's family relationships are shown by the following diagram (R. 843):



The grandfather died in 1862, at which time he was the owner of approximately 14,000 acres of land in Waialua, hereafter called the Holt lands, which are the lands in question. His will devised to each of the

three sons 1/3 of these lands for life, with remainder to the heirs of such son. Accordingly, John D. Holt, Mrs. Christian's father, had a life estate in 1/3 of these lands, and Mrs. Christian, as his daughter, had a contingent remainder. (R. 842)

John D. Holt had one child who died in infancy. Mrs. Christian was his only other child and survived him, John D. Holt dying in 1922. James L. Holt, whose name appears frequently in the testimony, is Mrs. Christian's cousin, as is also Mrs. Kentwell.

Residence in Honolulu.

John D. Holt and Mrs. Christian moved to Honolulu in the early 1890's. In 1901 they went to live with Mrs. Kentwell, and, save for periods when Mrs. Christian was in boarding school, have lived with her ever since. (R. 844)

In April 1893, Mrs. Christian as a child entered the Catholic Convent in Honolulu for music lessons (R. 1079). She entered as a boarder in September 1894 at the age of 9 and remained until June 1899, a period of five years. While there she studied the catechism, received communion, and attended confession. (R. 1292)

On August 3, 1900, Mrs. Christian accompanied Mrs. Kentwell to the Catholic Convent at San Jose, California, where she remained as a boarding student for one year. She then returned to Honolulu where she entered as a student at the Priory School. (R. 844)

She withdrew from this school in 1902, when she gave birth to an illegitimate child. In May 1902 she

(then aged 16) testified as a witness in a criminal prosecution of one Hall, charged with her rape, and claimed to be the father of her child. (R. 1130)

On June 12, 1902, Mrs. Christian, her father and Mr. and Mrs. George C. Sea appeared before the Circuit Court in Honolulu and participated in adoption proceedings whereby Mr. and Mrs. Sea adopted Mrs. Christian's child as their own. (P 1028)

On January 26, 1903, Mrs. Christian (then Eliza Holt, aged 17) married Albert Christian, a Dane-Scot, in the Catholic Cathedral in Honolulu. Rev. Father Clement (dead at the time of trial) performed the ceremony. The witnesses were the sister of the groom and the father of the bride. (R. 845)

After six months of married life Mrs. Christian left her husband, and returned to live with her father and Mrs. Kentwell. Some time later, Mrs. Kentwell as relative and guardian of Mrs. Christian as a minor, filed an action to annul the marriage on the ground that Mrs. Christian was mentally incompetent to contract marriage, and that her marriage was part of a conspiracy to obtain her property. (R. 846) After a trial, a decree was entered holding (March 1905) the marriage "was and is valid and legal and binding". The opinion of Judge Gear states "While it seems to me that it perhaps would have been much better for the plaintiff never to have married * * * the plaintiff has not shown such a case of incompetency as to justify the court in annulling the marriage." (R. 1342) The testimony in this proceeding is missing. (P. 1341)

Departure from Honolulu for the Mainland.

On September 4, 1906. Mrs. Christian left Honolulu for the mainland with her father and Mr. and Mrs. Kentwell. After a few months at Cambridge, Massachusetts, the family settled at Elizabeth, New Jersey, where they remained until June 1909. Mr. Kentwell attended Columbia Law School, graduating with the degree of L.L.B. During this period, a second child was born to Mrs. Christian, while on her way to a hospital. This child has since died. (R. 846)

In June 1909, Mrs. Christian, her father and the Kentwells moved to Oxford, England, where she has since lived. Mr. Kentwell continued the study of law at Oxford, receiving a law degree in 1912. He spent the next two years at King's College, Cambridge University, and was called to the Bar in 1916. (R. 846)

John D. Holt died in Oxford on April 10, 1922, leaving Mrs. Christian as his sole heir. He had attempted on June 12, 1918, to adopt the six Kentwell children, in which event they would have been heirs equally with Mrs. Christian (R. 1360), and Waialua's interest, as her successor, would have been reduced from 1/3 to 1/21. The adoption failed, however, because the Hawaiian law was not complied with. (R. 305)

In June 1926, in England (at the instance of Mrs. Kentwell) Mrs. Christian was declared incompetent and Mrs. Kentwell was appointed guardian of her estate. On February 1, 1927, a guardian was appointed in Honolulu. (R. 847)

Mrs. Christian's Business Transactions.

Until placed under guardianship in 1926 at th age of 40, Mrs. Christian moved freely about, and wa accepted by business and professional men as a com petent participant in business transactions; she ac knowledged instruments before public officials and witnesses attested to her execution. So far as the record shows, none of her transactions, with the ex ception of those here involved, have ever been chal lenged.

The business transactions in which Mrs. Christian participated in the period 1905-1923 are as follows

March 17, 1905. Mrs. Christian joined in the exe cution of the 25-year lease to Waialua, which is here being attacked. Other parties include the adminis trator of the R. W. Holt Estate, the children of Owen J. Holt, deceased, James L. Holt and John F. Colburn. All of these with the exception of Colburn, were close relatives of Mrs. Christian. Her acknowledgment was taken by N. Fernandez, who is now dead. The lease was duly recorded. (R. 874)

August 31, 1906. Mrs. Christian by contract as signed the rents to accrue to her under the 1905 lease and other rents to accrue from the Holt property, in consideration of Mrs. Kentwell's agreement to sup port her for life. The contract was also executed by Mrs. Kentwell, witnessed by John D. Holt, acknowl edged by N. Fernandez, and duly recorded. (R. 895) Waialua succeeded in 1910 to the ownership of this contract (the 1906 contract), which is also being at tacked in this suit.

August 31, 1906. Mrs. Christian executed a lease of her Makaha lands to Mrs. Kentwell for 15 years after the death of John D. Holt. This lease was likewise signed by Mrs. Kentwell, witnessed to John D. Holt, acknowledged by N. Fernandez, and duly recorded. (R. 1173)

June 13, 1907. Mrs. Christian in New Jersey executed a confirmation of a lease of John D. Holt, Jr., to Mrs. Kentwell. Her acknowledgment was taken by E. L. Mack, an attorney and notary, and duly recorded. (R. 1314)

June 14, 1907. Mrs. Christian executed an option to May K. Brown, covering the sale of Makaha lands for $10,000, the consideration for the option being $2500. The acknowledgment was taken in New York by E. L. Barnard, an attorney and notary, and duly recorded. (R. 1326)

June 14, 1907. Mrs. Christian executed a consent to the deed of Annie Kentwell to May K. Brown. This document was also executed by Mr. and Mrs. Kentwell, acknowledged in New York before E. L. Barnard, attorney and notary, and duly recorded. (R. 1328)

October 26, 1907. Mrs. Christian and John D. Holt executed a conveyance of certain property at Makaha, Oahu, to L. L. McCandless. This is the same McCandless who offered to buy her contingent interest in the Holt lands in 1910 for $30,000. The deed was acknowledged in New Jersey before E. L. Mack, attorney and notary, and duly recorded. (R. 1320)

May 2, 1910. Mrs. Christian executed the deed here under attack. This deed is also executed by Annie

Kentwell, Lawrence Kentwell and John D. Holt. It was witnessed by David L. Withington, and acknowledgments were taken in London before Richard Westacott, American Vice Consul. Albert Christian, husband of Mrs. Christian, executed his consent in San Francisco later. The deed was duly recorded. (R. 953)

May 12, 1912. Mrs. Christian executed a deed to John M. Dowsett to her contingent interest in lands at Waianae. Consideration $10,000. The acknowledgment was taken by Richard Westacott, American Vice Consul and the document was duly recorded. (R. 1409)

All of these documents were signed by Mrs. Christian, acknowledged by her and recorded. Her acknowledgments were taken by notaries and commissioners of deeds in Honolulu, New Jersey and New York, and twice by the American Consul in London.

She executed the following powers of attorney:

January 11, 1923. Power of Attorney, Mrs. Christian to Henry Smith, executed in the presence of J. Rose, a Notary Public in Oxford. (R. 1358)

March 16, 1923. Power of Attorney, Mrs. Christian to Henry Smith, executed in the City Hall of Oxford, in presence of two Notary Clerks with the certificates of James Rose, Notary Public, and the Mayor of Oxford attached. (R. 1358)

She likewise executed before a Mr. Linnel, a solicitor in Oxford, a document which was not produced. This was in the presence of Mrs. Kentwell and Dr. Steadman, her then physician. (R. 1193)

Mrs. Christian Has Been Accepted on Four Occasions by the Hawaiian Courts as a Competent Participant in Legal Proceedings.

Mrs. Christian has participated in the following court proceedings:

The Minority Guardianship Proceeding. On August 3, 1900, Mrs. Kentwell was appointed guardian of Mrs. Christian (then Eliza Holt), as a minor. (R. 1211)

The Hall Trial. In May 1902, Mrs. Christian (then Eliza Holt) appeared as a complaining witness against a man charged with rape. She was accepted as a competent witness. (R. 1130)

The Adoption of June 12, 1902. On June 12, 1902, an agreement of adoption was entered into between George and Maria Sea, John D. Holt and Mrs. Christian (then Eliza Holt) by which the Seas adopted Mrs. Christian's child. Both John D. Holt and Mrs. Christian consented to the adoption. The proceedings were before Judge W. J. Robinson, then judge of the Circuit Court, and the adoption agreement was duly recorded. (R. 1028)

The Annulment Proceeding. An action was instituted in Honolulu in 1905 by Mrs. Kentwell to annul Mrs. Christian's marriage, upon the claim that she was a congenital imbecile and mentally incompetent to contract marriage, and upon the further ground that the marriage was part of a conspiracy to obtain her property. This proceeding was decided adversely to the petitioner, the decree setting forth that the mar-

riage was not void but was valid and binding. (R 1342)

So far as the record shows, Mrs. Chrsitian was never during the 40 years prior to her guardianship in 1926, refused as a party to a legal instrument or as a witness; or in school, or in Church, or in marriage, because of her alleged incompetence.

Nor has she ever appeared in court in this proceeding, or been examined by a medical expert appointed by the court.

The Waialua Plantation.

Waialua Agricultural Company, Ltd. was incorporated under the laws of Hawaii on October 12, 1898 (R. 847)

It took over a small plantation known as the Halstead plantation at Waialua on the Island of Oahu (the island on which Honolulu is situated), and commenced the growing and manufacture of sugar. (R 847)

Its plantation now comprises 49,063 acres, of which 9,904 acres are in cane, 11,625 acres are leased to the Hawaiian Pineapple Company, and the balance is waste land. (R. 1493)

Sugar cane requires two years to mature, so that a crop from only half the area is taken each year and large amounts of working capital are required. Cane will not grow on the higher altitudes and will grow on the lower altitudes—below the 750-foot elevation—in the Waialua district only when large quantities of water are available for irrigation. (R. 990)

Pineapples do not grow at the lower elevations and the land generally suitable for sugar cane is not suitable for pineapples. (R. 995)

Pineapples were not successfully grown commercially in Hawaii until comparatively recent times. James D. Dole testified that although the first pack of pineapples was in 1903, the growing of pineapples did not become a firm and assured industry until 1921—eleven years after the deed in question was delivered and sixteen years after the lease was made. (R. 1387)

The Waialua plantation is essentially a manufacturing enterprise including in one unified operation the growing, manufacture, transportation and marketing of sugar. It requires large amounts of capital, one of the largest items being that invested in securing a supply of water. Not only is the operation of the plantation a unified enterprise, the object of which is the manufacture of sugar as a completed product, but the growing of sugar cane is in itself an intricate, hazardous and highly technical agricultural undertaking. An enormous supply of water for irrigation is absolutely essential and such water must be available upon call. It takes from 500,000 to 700,000 gallons of water to produce a ton of sugar. (R. 1457) As approximately two years are required to mature the cane, large sums must be laid out in the cultivation of the crop before it reaches maturity. (R. 986-991)

Sugar cane is of many varieties and unless a variety is selected which is suitable for the particular land,

and unless it is fertilized and cultivated in exactly the right manner, failure is inevitable. The fact that the Holt lands have been successfully cultivated for sugar cane has depended primarily upon the ingenuity and capital invested by Waialua in locating, storing and by means of pumps, dams, ditches and reservoirs, providing an unfailing source of water supply, and, in addition, upon the agricultural skill and research of its technical staff and the ability of its executives to successfully conceive, build up and operate a sugar-manufacturing enterprise.

The Waialua Lands and the Holt Property.

Exhibit S-3[1] (attached hereto) is a map, drawn to scale, showing the property in question and the improvements upon it as of February 1, 1932. The top of the map is generally north, the right hand side east, the left west, and the bottom south.

The properties of Waialua are shown in color, the yellow indicating cane land and the pink indicating pineapple land. The Holt property is enclosed in a green border. Besides the main piece, there are two small pieces south of the westerly tip of the Holt lands.

The plantation extends from the Pacific Ocean to the west, up to the heights of the Koolau mountains on the east; from sea level to an altitude of more than 1700 feet. It will be noted that the cane areas lie at the lower levels and the pineapple lands at the

1. This map is described in detail at R. 1492-1505.

higher elevations, the lower limit of the pineapple lands being about 750 feet elevation.

The Holt lands form a wedge-shaped area of 13,950 acres lying in the center of the plantation and dividing it into almost equal halves. (R. 843)

The areas are as follows (R. 1493):

Total plantation = 49,063 acres, of which
9,904 " are cane land
11,625 " are pineapple land
27,434 " are waste, forest and water land.

The Holt lands (included in the above areas) are:

13,950 acres, of which
1,623 " are cane land
6,476 " are pineapple land
5,851 " are waste, forest and water land.

The Holt lands comprise:

28+% of the total plantation area
16+% of the sugar area
55+% of the pineapple area.

The Plantation Improvements.

The plantation improvements are shown on the map (attached hereto). The mill is in the southwest section and is shown as a red circle. Around it are grouped the residences of the executives, of the mill workers, and many of the plantation laborers. (R. 1492)

An extensive system of plantation railroads, centering at the mill and extending into all parts of the plantation for the transportation of cane from the fields to the mill, is shown by the conventional crossed line. Roads are indicated by a double line; reservoirs and ditches by blue lines; tunnels by a dotted blue line; camps and pumping plants and power plants are shown by lettering; reservoirs are shown in blue.

All of the improvements, with the exception of the railroad and roads in the pineapple area, are used in connection with the growing and manufacture of sugar.

The Plantation Is One Unit.

The map indicates the essential unity of the sugar plantation. The railroads, roads and power lines all radiate from the mill and completely cover the cane area so as to serve each part; all designed to provide economical transportation from field to mill. The laborers' quarters are distributed over the entire cane area at convenient points, the men being employed primarily in the nearby areas but also working generally throughout the plantation. (R. 1494)

The irrigation system, which supplies the vital requirement of water, is also a unit (R. 1557), and is particularly designed and constructed so as to serve all parts of the sugar area. The water supply is from three sources: (1) Wahiawa reservoir, which is shown on the southeast corner; (2) mountain waters which are diverted from the streams high in the up-

lands, and brought to the low-lying sugar area through an intricate system of reservoirs and canals: and (3) pumping plants, located in the lowlands near the stream beds, and pumping into high line ditches. Practically none of the water, except that withdrawn through pumps built by Waialua at great cost, originates on the Holt lands.

The improvements also constitute a unit. Each improvement is located where it will be most effective for the service of the entire plantation. While the map shows the Holt lands, heavily outlined in green, the separation is purely imaginary. The railroads, camps, roads, telephone and power lines, ditches, reservoirs and all other improvements being located in conformity with the demands of efficiency without relation to whether they are on Holt or other plantation lands. Some are part on and part off Holt lands, some on Holt lands serve Holt lands and other lands, some off Holt lands serve the Holt lands. (R. 1494)

Changes in the Title to the Holt Lands.

As has been pointed out, the ownership of the Holt lands descended from R. W. Holt to his three sons, each of whom had a life estate with the remainder to his heirs. On June 11, 1891, the first son, Owen J. Holt, died, and one-third vested in fee in his nine children (one of whom was Mrs. Kentwell) each becoming the owner of 1/27 in fee. At the time of the 1910 deed, James L. Holt owned the life estate in the other two thirds and the contingent remainder in one of

these thirds. Mrs. Christian owned the contingent remainder in the other third.

Because the Holt lands divided the lands Waialua then had or hoped to acquire, it looked forward to their ultimate acquisition. In 1899, Waialua purchased the 1/27 fee of Robert Holt, and on June 7, 1900, the 1/27 fee of Christopher J. Holt. (R. 849). In 1899 the Holt Estate leased these lands to one Emmeluth for a period of 49 years at a rental of $10,000 a year. The lessee defaulted and in 1902 the lease was cancelled. (R. 1239)

The 1905 Lease.

As early as 1902 Colburn, Trustee for James R. Holt, approached Waialua and offered to lease the Holt lands. (R. 1241) Discussions continued over a period of years and finally culminated in a lease dated March 17, 1905 (the lease which is here being attacked). (R. 367) This lease, which was joined in by Mrs. Christian, was for a term of 25 years at a rental of $9,000 per annum net above taxes. Waialua preferred to pay $3,500 a year plus a percentage of the crop as rental, but the lessors insisted on a cash rental of $9,000 and the lease was made on their terms. (R. 557, 1242)

When the lease was made the Holt lands had never been cultivated. (R. 1489) Taxes for four years were delinquent. (R. 557) Pineapple culture was not thought of. (R. 1481) The lands were a barren waste, covered with noxious growth. (R. 1488) They had no water except the sporadic deluges that came down

the gorges from the upper lands. Under the Hawaiian law, water, except for domestic requirements, belongs[1] to the owner of the property on which it originates. (R. 1263) Therefore, the waters which passed down the streams and were the only natural sources available to the Holt lands, belonged to, and could be taken by the owners of the upper lands to the exclusion of the Holt lands. These were the property of the Bishop Estate and the Territory. Waialua since 1901 had a lease of these lands and the right to use the water from them on the Bishop Estate lands which it had leased. These lands lie to the north of the Holt lands and upwards towards the mountains. (R. 1252)

Upon the delivery of the lease of 1905 Waialua entered upon the property with a gang of men and commenced clearing the heavy growth of underbrush and the many rocks and boulders which covered its surface. Hand labor was ineffective, so a lantana-machine was necessary. (R. 1488, 1489) As many as two hundred men were employed at one time in the work of clearing, and approximately $45,000 was spent in this work during the first two years. This sum represents only the direct costs, no account being taken for indirect costs or for perquisites (housing, medical care, water, etc.) received by the laborers. (R. 1510)

The work of bringing water to the land was prosecuted as rapidly as possible, with the result that the

1. *Territory v. Gay*, 52 F.(2) 356.

necessary ditches on the lands were under construction before the end of 1905 and Wahiawa water was actually made available in the early part of 1906. (R. 1242)

The work of planting cane commenced immediately following the clearing, but only forty-five acres of cane were available for harvesting in 1907, and it was not until 1908, three years after the lease was made, that a full crop (from one-half of the land planted) was ready for gathering. (R. 991, 995)

Title to Holt Lands in 1910.

In August, 1905, a purchase of an 18/27 fee interest in the lands by Waialua was discussed with the administrator of the Holt estate. (R. 1243) This was discussed on the basis of a price of $108,000, or $6,000 for a 1/27 interest in fee. The sale fell through, however, because it was found that a fee simple title could not be conveyed by the estate, because of the contingent interests. (R. 1250)

After the 1905 lease was executed, Waialua made other purchases of interests in the Holt property as follows:

August 4, 1905, 1/27 vested fee interest of George H. Holt. (R. 894)

August 5, 1905, 1/27 vested fee interest of Mrs. Kentwell. (R. 894)

May 7, 1906, 1/27 vested fee interest of the minor children of Helen A. Holt. This sale

was confirmed by the guardianship court. (R. 894)

June 29, 1907, 2/27 fee interest of J. D. Holt Jr. and Owen J. Holt. (R. 899)

The situation with respect to the title when the May 2, 1910 deed was executed, was as follows:

Waialua owned a 7/27 interest in fee and had a lease on the entire property which would not expire until 1930.

James L. Holt, the cousin of Mrs. Christian, was the owner of his father's life estate in 1/3 which he had acquired in 1902. (R. 850) As the son of his father, he had a contingent remainder in the same 1/3, and having acquired in 1893 the contingent interest of his brother, the only other child, he was the owner of that entire 1/3 contingent remainder. (R. 849) He was also the owner of the life estate of Mrs. Christian's father, John D. Holt, in 1/3 which he had acquired in 1902. (R. 850) He therefore owned a life estate in 2/3, and a contingent remainder in 1/3 subject to the 1905 lease. These interests had been conveyed by James L. Holt in 1902 to John F. Colburn as his Trustee, and Colburn's name appears frequently in the testimony. (R. 853)

Mrs. Christian owned the contingent remainder in 1/3 dependent upon her surviving her father and being his sole heir, and subject to the 1905 lease and the 1906 contract assigning the rents to Mrs. Kentwell.

The remaining 2/27 interest in fee (subject to the 1905 lease) was owned by Elizabeth H. Richardson and Edward S. Holt.

The Negotiations Leading Up to the Purchase.

Although the evidence is fragmentary, the general outline of the negotiations leading up to the deed is clear.

James L. Holt, the owner of the life estates in 2/3 and the contingent remainder in 1/3 had been trying for some time, with the help of Colburn, his trustee, to sell to Waialua. This sale was contemplated as early as July 1902 (R. 1017), but was not made because the first takers were found to be merely life tenants and therefore could not convey a fee simple title. (R. 1017)

Holt continued his attempts to sell his interests to Waialua, but was unable to do so because Waialua refused to buy anything less than the entire two-thirds interest. (R. 1018) Holt therefore was interested in acquiring Mrs. Christian's contingent remainder, thus rendering salable his own interests to Waialua.

With respect to Mrs. Christian's interest, as far back as 1908 Kentwell was writing to Honolulu, endeavoring to arrange its sale. Holt says he wanted to buy it then, but that the deal fell through because his purchase was "predicated on getting the title straightened out in court." (R. 1018)

Further attempts by Holt to sell his interests to Waialua proving unsuccessful, he finally accepted an offer of Mrs. Christian's contingent remainder for $30,000, and Mrs. Kentwell's interest for $5,000, and

arranged for the sale of his whole interest, i.e., the two life estates and the entire two-thirds contingent remainder to Waialua for $120,000. (R. 915, 926)

Holt did not have the funds to pay Mrs. Christian (R. 1014) and suggested that Waialua advance these funds and take delivery of the deed. (R. 918) This was apparently agreed upon, for Mr. Withington, who was Mr. Castle's law partner, and who was at the time in Boston, proceeded to England, where he met Mrs. Christian, her father and the Kentwells. The deed was executed a few days later before the American Consul in London, at which time Mr. Withington paid over the purchase price. (R. 944) In due course the deed was recorded in Honolulu, Holt having already delivered his deed to Waialua of his interest and the interest acquired by him from Mrs. Christian by the 1910 deed.

Waialua Has Spent More Than One Million Dollars in Improvements on the Holt Land and Off the Holt Land in Connection With It.

Waialua had proceeded to improve the Holt lands as a part of its unified plantation, immediately after it executed the 25 year lease in 1905. It continued and expanded that work of improvement after the deed of May 2, 1910, and in reliance on it. (R. 578) It further increased its work of improvement of the Holt lands after the death of James L. Holt's father in 1916, when the fee in that 1/3 vested and after the death of Mrs. Christian's father in 1922, when the fee in the remaining 1/3 vested, and Waialua considered itself the owner of the fee.

The total expenditures for improvements on the Holt lands are shown on Exhibit S-5 (R. 1507) where they are segregated as to items and as to periods. They may be summarized as follows:

From April 1, 1905 (when lease was made) to May 2, 1910 (when deed was made)	$182,525.07
From May 2, 1910, to April 10, 1922 (when fee vested)	203,513.43
From April 10, 1922, until April 5, 1928, when deed was first questioned	244,683.62
Total	$630,722.12

In addition the Wahiawa reservoir (R. 1515) and ditch located almost entirely off the Holt lands (R. 1516) without which the successful growing of sugar cane on the Holt lands would be impossible, (they use 1/3 of the waters), cost—

Dam and spillway	$448,555.94
Ditch	66,039.00
Total	$514,594.94

The Pineapple Lands.

As already pointed out, the Holt lands comprising 13,950 acres in all, are divided into 1623 acres of cane land, 6476 acres of pineapple land, and 5,851 acres of waste and forest.

The cane lands lie below the 700 foot elevation at which the Wahiawa ditch crosses, and which provides

water for their irrigation. The upper lands, above the ditch, are not suitable for growing cane, the plantation manager testifying that he attempted to grow "dry-land" cane there in 1906 and 1907, but although he planted 40 different varieties of cane, it all was a failure. (R. 1246)

The land other than the 1623 acres of cane land, (amounting to 12,227 acres), was therefore unsuited to cane growing. In 1905 it was believed to be of use only as pasture land (R. 1490), being considered by pineapple growers as not suited for that purpose. (R. 1481)

As found by the Supreme Court of Hawaii:

> "At the time of the execution of the lease and even later at the date of the instrument of August 31, 1906, it was not known to any of the parties or to anyone else that pineapples could be successfully or profitably grown on the upper lands of the Holt estate. It was not until about fifteen years later that the W. A. Co. was able to lease the upper lands for pineapple purposes at large rentals." (R. 559)

Mr. James Dole, the pioneer of successful pineapple culture in Hawaii, testified at length regarding the growth of the pineapple industry. (R. 1385 et seq.) In 1903 the first pineapples were canned. In 1910 the industry was very depressed. Fertilizing in 1910 was in an experimental state, and large quantities have only been used during the past few years. Caterpillar tractors were introduced in 1913 and are one of the

major factors in permitting pineapple growing on a large scale. (R. 1386)

The iron sulphide spray was introduced in 1916 and made available for pineapple growing large areas where pineapples would not grow before. The great bulk of the Holt lands now used for pineapples was worthless for pineapples in May 1910, but the introduction of the iron sulphide spray in 1916 made them suitable because it supplied iron directly to the plants. Even with the introduction of the iron sulphide spray, these lands would not be as useful as they are, except for the introduction of paper mulch, which was tried out in 1920 and came into general use in 1921 and 1922. The pineapple industry was not on a firm and assured foundation until 1921. In 1910 the Hawaiian Pineapple Company could not get money from the banks unless underwritten by the large stockholders. (R. 1386, 1387)

The Pineapple Lease of January 10, 1923.

The title to the contingent 1/3 interest purchased from Mrs. Christian vested when her father John D. Holt died on April 10, 1922.

At that date the Holt pineapple lands (6476 acres) were leased to many tenants. Most of the leases were about to expire. In addition to the Holt pineapple lands Waialua had 5,674 acres of additional pineapple lands, making a total of 12,150 acres.

Waialua then entered into negotiations with the Hawaiian Pineapple Company, looking to the leasing

of the entire area. After negotiations Waialua and Hawaiian Pineapple Company executed an option agreement on October 14, 1922, whereby Waialua gave the Pineapple Company the option to lease these 12,000 acres more or less, at an annual rental of $15 per acre (a substantial increase over existing rentals). As consideration for this option, the Pineapple Company paid $60,000 in cash and gave Waialua the option to purchase a 1/3 interest in the Pineapple Company at a stated price per share of stock. The exercise of one option was not dependent upon the other. (R. 166)

On October 14, 1922, Waialua exercised its option and purchased 23,000 shares of Pineapple Company stock paying $1,214,000 in cash. On November 28, 1922, Waialua elected to purchase an additional 40,144 shares and gave its note for $2,118,019 at 5% interest in payment. (R. 168)

On January 4, 1923, the Pineapple Company exercised its option to lease the pineapple lands from Waialua and on January 10, 1923, the lease was executed. It covers 12,150 acres of which 6,475 are Holt lands, for a term of 17½ years from January 1, 1923, to June 30, 1940, at a paid up rental of $2,109,179.25, with an option for an extension of 20 years at a rental to be agreed upon. (R. 973)

The annual rent for the entire 17½ year term was discounted at 5% per annum and paid in a lump sum amounting to $2,109,179.25, which was credited on the note previously given by Waialua in payment of the

purchase price of stock in the Pineapple Company. (R. 168)

The fact therefore is that, following the death of John D. Holt in 1922, when Waialua considered it was the owner in fee of the 1/3 interest in the Holt lands purchased from Mrs. Christian, it executed a single lease to the Pineapple Company, covering all the Holt pineapple lands (6475 acres) and its other pineapple lands, to the aggregate acreage of 12,150 acres for 17½ years with an option to renew for a further period of 20 years.

And it is also the fact that when it believed it had a valid title Waialua purchased a 1/3 interest in the Pineapple Company.

In connection with the pineapple lease it was necessary to abandon certain improvements on the Holt lands. (R. 1535) These are listed on Ex. S-6 (R. 1511 et seq.) as the ones abandoned in 1923. They consisted of camps ($6,771.65); railroads ($9,159), waterways and flumes ($896.90), a total of $16,800.

Deaths of Witnesses.

In the time intervening between the execution of the instruments and the trial, the following witnesses became unavailable:

David Withington, attorney for Waialua, who supervised the transaction in London, died in 1919.

W. R. Castle, who was Mr. Withington's partner and who represented Waialua in Honolulu in con-

nection with the transaction, was permanently incapacitated and unable to testify.

John F. Colburn, who, as trustee, joined in the execution of the deed of May 28, 1910, to W. R. Castle and who knew Mrs. Christian well, was dead.

Richard Westacott, Vice Consul in London, before whom the deed of 1910 was acknowledged by Mrs. Christian and who also took the acknowledgment of Mrs. Christian's deed to Dowsett in 1912, was dead.

Clarence Ashford, attorney for J. F. Colburn, was dead.

N. Fernandez, who took the acknowledgments in Honolulu of several documents executed by Mrs. Christian, was dead.

The young man who assisted Mr. Withington in London in connection with the transaction, was dead.

Rev. Father Clement, who officiated at the marriage of Mrs. Christian at the Catholic Cathedral in Honolulu in 1903, was dead.

On page 977 of the record are listed the names of twenty-two persons whose testimony would be valuable, who were dead or otherwise unavailable.

Missing Documents.

The court records in the guardianship (minor) proceedings of Mrs. Christian in 1900 are missing. (R. 1211)

The court records in the annulment proceedings are missing with the exception of the judgment and the

opinion of the judge. This was a proceeding which directly involved the question of Mrs. Christian's competence.

The originals of Mrs. Christian's letters at the time of the transaction are missing.

The original of the alleged April 15, 1910, agreement is missing.

Many of the letters and cablegrams passing between Holt and Kentwell in connection with the 1910 transaction are missing, only copies exist as to the others.

Other letters and vouchers in connection with the transaction are lost.

Not a single original paper, letter or document was produced by the grantor. The only originals produced were recorded documents or from Waialua's files. Despite the many letters and other papers which James L. Holt and Mrs. Kentwell testified they received, not a single one was produced. (R. 1015, 1018, 1020, 1189)

Discredited Witnesses.

The trial court excluded from consideration the testimony of James L. Holt and of Mrs. Kentwell (R. 122, 159) and the Supreme Court of Hawaii did not even mention James L. Holt's testimony. The Supreme Court said regarding Mrs. Kentwell, "This witness is greatly discredited * * *" and again "Leaving out Annie Kentwell's testimony as being unreliable * * *." (R. 275)

Witnesses Not Produced.

Neither Mrs. Christian nor Lawrence Kentwell, Mrs. Kentwell's husband, were produced as witnesses.

Point I.

THE CIRCUIT COURT OF APPEALS ERRED IN NOT HOLDING THE INSTRUMENTS VALID AND UNASSAILABLE, WAIALUA HAVING TAKEN IN GOOD FAITH WITHOUT NOTICE OF INCOMPETENCE AND FOR AN ADEQUATE CONSIDERATION.

As has already been pointed out, the Circuit Court of Appeals (R. 1605) accepted the findings of the lower court "that the company had no notice of the incompetency".[1]

The Supreme Court of Hawaii held that the consideration paid for the deed was adequate, (R. 304) and that not only was there adequate consideration for the lease, but that it was highly beneficial to Mrs. Christian. (R. 558)

It is our contention that under these circumstances none of the instruments should be cancelled, and that the Circuit Court of Appeals erred in so decreeing.

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1. The Supreme Court of Hawaii held "In the case at bar as already held, while Eliza was an imbecile and mentally incompetent, the W. A. Co. had no knowledge of that incompetency at the time that it dealt with her in 1910. The same must necessarily be true as to 1905 and 1906." (R. 555)

Erroneous Rule Adopted by Circuit Court of Appeals.

So far as we can find, no state (and no other common-law jurisdiction) follows the rule that the deed of an incompetent is void. The history of the law on the question is adequately discussed by Holdsworth. (*History of English Law*, VIII, 52 et seq.)

The Circuit Court of Appeals therefore erred when it announced the rule that the deed of an incompetent is void because an incompetent is incapable of giving the required assent:

> "We hold that contracts made by an incompetent are void because an incompetent is incapable of giving the required assent thereto." (R. 1597)

In denying rehearing, the Circuit Court of Appeals recognized that it had departed from accepted views, but explained that it had reached the same result as would have been reached by other courts which do not accept the "void" rule, saying:

> "Heretofore, the majority of the courts have reached the same result on the ground that an incompetent person's contract is voidable. We were and are unwilling to accept that reasoning because we believe an incompetent person 'is incapable of giving the required assent.'" (R. 1634)

We shall point out later that other courts, applying the correct rule of law, do not reach "the same result," and that a court of equity will shield an innocent purchaser for value in the circumstances presented here.

Counsel for Mrs. Christian contend that the challenged instruments are all nullities by reason of an inexorable "Federal Rule." Their position is stated in the concluding pages of their brief in opposition to our petition for certiorari:

> "Even though we assume that the bargain was fair, the consideration adequate, that Waialua did not have knowledge of the incompetency, and that *status quo cannot* be restored, nevertheless all of the questioned instruments must be cancelled because the rule of decision in the Federal Courts is that a contract of an incompetent is void in the sense of being a nullity.
>
> * * * * * * *
>
> "The rule prevailing in the Federal Court is the rule of decision in this case arising in the Territory of Hawaii." (Br. pp. 36, 37)

1. There Is No "Rule of Decision In the Federal Courts" That the Deed of An Incompetent Is a Nullity.

There is no established "federal rule". The decisions of the lower federal courts are in hopeless conflict. Those favoring the rule that such deeds are void rest on the statement in *Dexter v. Hall*, 15 Wall. 9, 20, that

> "The fundamental idea of a contract is that it requires the assent of two minds. But a lunatic or person non compos mentis, has nothing which the law recognizes as a mind; and it would seem therefore, upon principle, that he cannot make a contract which may have any efficacy as such."

In that case this Court held that a power of attorney executed by a lunatic is "void". While under the facts there presented the result was doubtless correct, for the principal was confined in an asylum at the time, the court's expression has been interpreted by many federal courts[1] as a declaration that the deed of an incompetent to an innocent purchaser is "void" to such an extent that many of the courts have characterized it as "Federal" rule to be applied in all federal courts, irrespective of the law of the situs of the land. It is referred to in encyclopedias and some text books as the "Federal" rule.[2]

The court below in declaring the deed of an incompetent void as urged by Mrs. Christian's counsel, cited *Dexter v. Hall* as authority for its declaration "We hold that contracts made by an incompetent are void because an incompetent is incapable of giving the required assent thereto. *Dexter v. Hall*, supra, * * *." (R. 1597)

In *Sothern v. United States*, 12 F.(2d) 936, 937, the court summarized its view of the law on this subject as follows:

> "* * * the courts of the United States have uniformly held a contract of a lunatic or an

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1. *Plaster v. Rigney*, 97 Fed. 12;
Edwards v. Davenport, 20 Fed. 756;
Anglo Californian Bank v. Ames, 27 Fed. 727;
Clark Car Co. v. Clark, 11 F.(2d) 814;
White's Guardian v. Martin, 2 Alaska 495.

2. 1 *Federal Law of Contracts*, Sec. 336.7 (1934 Ed.).

insane person is wholly void and subject to collateral attack. The leading case on that subject is Dexter v. Hall * * *."

The inaccuracy of this statement and the existence of a direct conflict in the federal courts, is illustrated in *Kevan v. John Hancock Life Insurance Company*, 3 F. Supp. 288, 289, 290, where District Judge Otis declared:

"I do not find a single federal appellate court decision announcing the rule that contracts generally, entered into by insane persons, not adjudicated insane, are absolutely void."

"My view of the matter is that it cannot be said that a Supreme Court dictum and five scattered District Court opinions, established any such federal rule as plaintiff contends for.

"The overwhelming weight of authority in this country in the state courts is that the contracts of insane persons who have not been adjudged insane, are voidable only."

Notwithstanding the confusion that exists in the federal decisions, the overwhelming weight of authority, and we submit the better view, is that the deed of an incompetent, before adjudication, is at most voidable and not void. That is the law in the great majority of states, it is the common law, it is the law of England, and it is the law as announced by text writers and commentators such as Williston, Story, Chitty, Pollock and Pomeroy.

And we submit such is the law as declared by this Court, and this view has been taken by some lower

federal courts.[1] In *Luhrs v. Hancock*, 181 U. S. 567, 574, this Court declared, "The deed of an insane person is not absolutely void: it is only voidable; that is, it may be confirmed or set aside."

2. The Error of the Circuit Court of Appeals In Adopting the Rule That the Deed of An Incompetent Is Void Resulted From a Fundamental Misconception of the Law of Contracts.

The Circuit Court of Appeals adopted a Nineteenth Century view of the law of contracts, i.e. that a meeting of the minds is essential to the formation of a contract, and, hence, where one party is incompetent there can be no meeting of the minds, and, therefore, no contract, saying:

> "We hold that contracts made by an incompetent are void because an incompetent is incapable of giving the required assent thereto. *Dexter v. Hall* * * *." (R. 1597)

As we have stated before, Mrs. Christian is no lunatic. The trial court, although finding her incompetent, held that she "neither was nor is an idiot, a lunatic, or utterly imbecile. She was and is, however, a person of undeveloped intellect (R. 132) * * * mentally incompetent to execute a conveyance (R. 133)."

The Supreme Court of Hawaii found that Mrs. Christian's mental condition was not so apparent as

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1. *Beale v. Gibaud*, 15 F. Supp. 1020;
Kevgn v. John Hancock Ins. Co., 3 F. Supp. 288;
Safe Deposit Co. v. Tait, 54 F.(2d) 383;
Levine v. Whitney, 9 F. Supp. 161.

to be discoverable by ordinary observation and that when Mr. Withington met with her, in connection with the execution of the deed, he "saw nothing in her to cause him to suspect that she was not of normal mind." (R. 276) This conclusion seems irresistible in view of the various conveyances in which she had been accepted as a competent party, her participation in court proceedings, and the fact that no guardian was appointed until she was more than forty years of age. When she affixed her signature to the deed, to the contract and to the lease, there is no question but that she knew she was executing a conveyance, and intended to affix her signature thereto.

The old notion that contracts and conveyances made by incompetents are wholly void, is based on the metaphysical idea borrowed from the Civil Law that a contract requires a meeting of the minds, and that since an incompetent has no mind, he cannot, therefore, make a contract. (*Dexter v. Hall,* 15 Wall. 9.) This is the view taken by the court below, and is the foundation of its decision.

The short answer to this proposition is stated by Professor Williston. He observes that the modern rule (that incompetents' contracts are voidable at most, and valid if fair), is:

> "* * * in line with the view now generally prevailing in regard to mutual assent as a requirement for the formation of contracts. According to the modern view actual mental assent is not material in the formation of contracts, the important thing being what each party is justified

in believing from the actions and words of the man he is dealing with. Accordingly, if one dealing with a lunatic may reasonably suppose he is sane and makes a bargain with him on that assumption, there is no theoretical difficulty in the lack of mutual assent. Lunatics whose acts can deceive anybody are not so totally devoid of will that their words and acts can be compared to talking while asleep or signing a paper substituted by sleight of hand." (1 *Williston on Contracts* (Rev. Ed.) Sec. 254).

The objective theory of contracts is adopted in the Restatement, and specifically stated to be applicable to contracts of insane persons.

Restatement of the Law, Contracts, Sec. 20:

"A manifestation of mutual assent by the parties to an informal contract is essential to its formation and the acts by which such assent is manifested must be done with the intent to do those acts; but, except as qualified by Secs. 55, 71 and 72, neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.

"Comment:

"a. * * * Nor is it essential that the parties are conscious of the legal relations which their words or acts give rise to. It is essential, however, that the acts manifestly assent shall be done intentionally. That is, there must be a conscious will to do those acts; but it is not material what induces the will. Even insane persons may so act; but a somnambulist could not."

The problem and its answer are well stated by Mr. Justice Holmes (Collected Legal Papers, Oliver Wendell Holmes, p. 178), as follows:

> "In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties' having ~~meant~~ the same thing but on their having *said* the same thing." (Author's emphasis)

See also:

Williston, op. cit., Secs. 20, 21, 22;
Holland, Jurisprudence (12th Ed.), pp. 119-120;
Langdell, Summary of the Law of Contracts, (2 Ed.) Sec. 180;
Holmes, The Common Law, pp. 309, 324, 325.

3. The Proper Rule Is That Contracts of Incompetents Are Valid If Made With An Innocent Purchaser for An Adequate Consideration.

The modern rule is concisely stated in *Imperial Loan Company v. Stone*, L. R. (1892) 1 Q. B. 599:

> "A contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of sound mind. In order to avoid a fair contract on the ground of insanity, the men-

> tal incapacity of the one must be known to the other of the contracting parties. A defendant who seeks to avoid a contract on the ground of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed."

Unquestionably it has been the law of England for many years.[1] As we shall see, this rule has now been announced by the courts of last resort in at least ten states.

We submit that this view is sound. It makes for security and certainty in land titles and commercial transactions, and protects innocent parties from attacks by incompetents (or their relatives who as here have joined in the conveyance) who delay for years to see whether the transaction later turns out to be favorable or unfavorable to the incompetent, and, after a

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1. *Niell v. Morley*, 9 Ves. Jr. 478 (1804);
Elliot v. Ince, 7 DeG. M. & G. 475 (1857);
Beavan v. McDonnell, 9 Ex. 309 (1854);
Molton v. Camroux, 2 Ex. 487, 4 Exch. 17 (1848);
Campbell v. Hooper, 3 Sm. & G. 153, 24 L. J. Ch. 644 (1855);
Hassard v. Smith, 6 Irish Reports, Equity 429 (1872);
Dane v. Kirkwall, 8 C. & P. 679 (1838);
Brown v. Jodrell, M. & M. 105 (1827);
Baxter v. Portsmouth, 5 B. & C. 170 (1826);
Imperial Loan Co. v. Stone, 1 Q. B. 599 (1892);
York Glass Co. Limited v. Jubb, 134 L. T. R. 36 (C. A. 1926);
Broughton v. Snook, 158 L. T. R. 130 (1938).

change in circumstances or increase in value, bring action to recover the property. It affords full protection to incompetents where there is any fraud or overreaching, and, as we shall later point out, there are adequate safeguards which amply protect incompetents.

a. This rule is now established in numerous states.

In *Goldberg v. McCord*, 251 N. Y. 28, 32 (1929), the New York Court of Appeals, in rejecting the contention that the deed of an incompetent should be set aside as against an innocent purchaser for value, said:

> "To arrive at such a conclusion it is necessary to assume that the incompetent, or some one in his behalf, may set aside any conveyance which may have been made by him during a period of mental incompetency, or brain affliction. Such is not the law. An insane person, before office found, may convey a good title; his deed is not void, but voidable (*Finch v. Goldstein*, 245 N. Y. 300, 157 N. E. 146); and it is not even voidable as against bona fide purchasers for value without notice of the incompetency."

In *Rubins v. Hamnett*, 294 Pa. 295, 299, the Pennsylvania court said:

> "Dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who dealt with him on the faith of his being a person of competent mental understanding."

In *McVeagh v. Hicks*, 211 Ky. 284, 288, the Kentucky court said:

> "Sales made by persons of unsound mind will not be set aside where the price was fair and no inequity was done to the person laboring under disability."

In *Farmers' National Life Insurance Company v. R. Y. G.*, 209 Ia. 330. 333, the court, in denying relief against an innocent purchaser, referred to *First National Bank v. Sarvey*, 198 Ia. 1067, and said:

> "We there held that the defendant had the burden of proving not only the insanity, but that the payee of the note had express or implied notice of such fact, and that the status quo must be restored."

In *West v. Seaboard Air Line Ry.*, 151 N. C. 231, 234, the court said:

> "The well-established rule is that the mere fact that one of the parties to the contract is of unsound mind (he not having been found to be a lunatic by judicial proceedings) does not render the contract void, but at most only voidable, and is no ground for setting it aside where the other party had no notice of the insanity and derived no inequitable advantage from it."

In *Atkinson v. McCulloh*, 149 Md. 662, 672, the court said:

> "In this state the contract of a person who has not been adjudicated non compos mentis is not void but voidable, and it is not even voidable at

> the arbitrary discretion of the incompetent person, but only in cases where the other party knew of the disability or where there was some element of bad faith or unfairness in the contract itself."

In *Sims v. McLure,* 8 Rich. Eq. (S. C.) 286, 288, the court said:

> "Indeed, a fair contract made with a lunatic by a third person without notice of the lunacy, will not be disturbed."

In *Rhoades v. Fuller,* 139 Mo. 179, 189, the court, in refusing to cancel an exchange of real estate where one party was insane, notwithstanding his offer to restore the consideration, held:

> "Under such circumstances, Rhoades, even if insane, was not entitled to have the trade rescinded, although he offers to, and is willing to refund to defendant all moneys paid out by him on said land, and to reconvey to defendant the house and lot received by him in exchange therefor. Proof of the insanity of Rhoades, even if shown to exist at the time of the trade, in the absence of fraud practiced on him by defendant or knowledge by defendant of his condition, will not justify setting aside the contract."

A number of additional cases applying this rule are cited in the footnote[1].

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1. *Arnett's Committee v. Owens,* 23 Ky. Law Rep. 1409;
   Ashcraft v. DeArmond, 44 Ia. 229;
   Bagley v. Holliday's Committee, 248 Ky. 453;
   Beals v. See, 10 Pa. St. 56 (1848—Opinion by Gibson, C. J.);

Decisions from seven states were cited in the brief accompanying our petition (pp. 24-26) in support of the modern rule that a conveyance by an incompetent for adequate consideration will not be disturbed unless the other party knew of the incompetency. Counsel for the grantor have attempted to explain away some of these cases on the authority of earlier decisions in some of the states, and as to other states, on the ground of later cases where rescission was denied for the announced reason that status quo could not be restored. Obviously neither type of case seriously impairs the authority of the cases referred to. The later cases mentioned are confusing, but they are not inconsistent with those cited by us.

b. The departure by numerous American courts from the proper rule by the addition to it of a qualification that cancellation will be decreed if status quo can be restored, resulted from a misunderstanding of Molton v. Camroux, and has no basis in logic or principle.

Many American courts state that an incompetent's contract will not be set aside as against an innocent party who paid fair value, but add, "unless the parties can be restored to status quo."

Eaton v. Eaton, 37 N. J. Law, 108;
First National Bank v. Fidelity Title & Trust Co., 251 Pa. 529;
Green v. Hulse, 57 Colo. 238;
Groff v. Stitzer, 77 N. J. Eq. 260;
Mattheissen v. McMahon, 38 N. J. Law 536;
Mutual Life Insurance Co. v. Hunt, 79 N. Y. 541;
Phillips v. Murphy, 186 Ky. 763;
Wood v. Newell, 149 Minn. 137;
Young v. Stevens, 48 N. H. 133.

This qualification of the English rule arose out of a statement in the much cited case of *Molton v. Camroux*, (1848) 2 Ex. 487, 4 Ex. 17, wherein, after declaring that the contract of an incompetent should not be set aside in the absence of fraud or notice, the court stated, as an additional reason for its decision, that "the parties cannot be restored altogether to their original position."

The American cases in question took account of the additional reason given for the decision in *Molton v. Camroux*, and proceeded to incorporate it into the rule itself.

As a consequence, numerous courts have announced the proposition that such a contract will not be set aside where the parties cannot be restored to status quo.[1] And some of these courts have proceeded to turn the negative into an affirmative and have held that such a deed will be set aside if the parties can be restored to status quo, thus converting what was originally given as an additional reason for refusing cancellation, into an affirmative ground for granting it.

This error is analyzed in *Harriman on Contracts* as follows, (2d ed.) Sec. 410, p. 243, where the author says:

> "In many American courts an anomalous doctrine prevails. This doctrine is that if the sane party is ignorant of the other's insanity and the

1. These cases are collected in 46 A. L. R. 419; 95 A. L. R. 1442.

contract is fair and cannot be rescinded so as to place the parties in statu quo, it is binding. This doctrine rests on some loose statements in an English case decided half a century ago. The present English doctrine is perfectly clear and logical; * * * but the attempt to make the validity of the contract depend upon its performance does not and cannot lead to satisfactory or intelligible results."

Professor Williston speaks on the question in part as follows:

"In the leading case of Molton v. Camroux, the rule was stated: 'The modern cases show that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defense cannot prevail, especially where the contract is not merely executory buf executed in the whole or in part and the parties cannot be restored altogether to their original positions.' * * * In the United States the weight of authority supports the rule quoted above from Molton v. Camroux. This princi[illegible] applies to the case of a deed made by a lunati[illegible]

1 *Williston on Contracts*, (Rev. Ed.) Sec. 254.

We submit that this gloss on the English rule, in addition to being the consequence of a misapprehension, is for the reasons already stated, indefensible in principle.

c. This cause is governed by the law of Hawaii, which is the common law of England as ascertained by English and American decisions.

The Circuit Court of Appeals for the Ninth Circuit, by virtue of the Judicial Code (Section 128, 28 U. S. C., Sec. 225), is vested with general appellate jurisdiction over all cases from the Supreme Court of Hawaii where the amount in controversy exceeds $5,000. In this case, therefore, the Circuit Court of Appeals has both the power and duty to declare the law. Its action is not comparable to that of a Circuit Court of Appeals in deciding a case which arises in one of the States. *Erie R. Co. v. Tompkins,* U. S. Sup. Ct. April 25, 1938.

The law of Hawaii is declared by statute to be "the common law of England, as ascertained by English and American decisions * * *." (*Rev. Laws Hawaii,* 1935, Sec. 1)[1]. This statute has been in effect since 1893. We contend, therefore, that in deciding appeals from the territorial courts, the Circuit Court of Appeals should follow the common law and, where there

1. "Sec. 1. Common Law Applies Except When. The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; *provided*, however, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the Territory." (Laws of Hawaii 1892; c. 57.)

are conflicting rules of the common law it should follow the rule established by the English and American decisions which appears to be the better view of the common law.

That rule, we submit, is the rule that the contracts of an incompetent with an innocent purchaser for an adequate consideration are valid and will not be rescinded.

d. Solicitude for Incompetent Persons Does Not Justify Injury to Those Who Deal With Them In Good Faith.

There is no reason, either in law or in public policy, why the mere fact of incompetence should cause the setting aside of an executed transaction with an innocent grantee. Granted that an incompetent should be given the fullest protection against overreaching—there is no sound reason why, in those cases where the incompetence has not been a factor in the transaction, the transaction should be set aside to the injury of an innocent grantee. The mere fact of incompetence should not entitle a grantor to a more favorable position than a competent person; it should not entitle the incompetent grantor who has made as fair a bargain as could the most skillful and able (one joined in by relatives, as was the case here) to set it aside years after, merely because the land has increased in value.

As pointed out by Judge Story (*Equity Jurisprudence*, 13th Ed. §227):

"The ground upon which Courts of Equity now interfere to set aside the contracts and other acts, however solemn, of persons who are idiots, lunatics and otherwise non compotes mentis, is fraud."

Incompetents Are Adequately Protected by Other Means.

It is, of course, a fact that other adequate means are provided in the law for the conservation of the property of incompetent persons. As was said in *Coburn v. Raymond,* 76 Conn. 484:

"The argument under review also forgets the provisions which are made by statute for the protection of the property interests of incapable persons and the prompt redress of their wrongs. It is made easy to put such persons beyond the power of contracting or disposing of their estate, and to provide a competent substitute to secure redress when occasion arises. It may be safely assumed that the friendly or selfish interests of friends or relatives will, in the presence of so simple a recourse, leave few incapable persons possessed of estate free to dissipate it, or, in the event of a wasteful bargain or disposition by one whose power has not been legally restrained, that such interests will prompt speedy action which will lead to an intelligent conservation of the incompetent's interests before delay has witnessed the dissipation of the consideration received, or permitted substantial changes in the status of the bona fide grantee." (p. 490)

Persons Dealing in Good Faith With Incompetents Have An Equal Claim on the Court's Concern.

The proposition stated is, we submit, self-evident. As was said in *Coburn v. Raymond*, 76 Conn. 484:

> "When the case involves an innocent, bona fide grantee, the court has before it two innocent parties between whom it is in duty bound to do equity to the best of its ability. It has no right to shut its ears to the claims of either party * * * if, on the whole case, it would be inequitable to set aside a conveyance, there is no inexorable rule that it must be done because, perchance, the grantor was deficient in mental capacity." (p. 490)

And in *Edwards v. Miller* (1924), 102 Okla. 189, it is said:

> "If the lunatic and his relatives and friends and those upon whom rests the moral or legal duty to protect him in his unfortunate mental condition fail to have his mental incapacity judicially determined so that others may learn of his condition, and the mental condition and appearance of the lunatic is such that he causes even the cautious and prudent individual with whom he deals to believe in good faith that he is a fully competent person, then simple justice demands that innocent third persons be not made to suffer and lose moneys actually paid out by them in good faith in carrying into effect the contracts made by them with such lunatic whose mental condition and actions made him appear to them to be a fully competent individual." (p. 191)

Point II.

EVEN UNDER THE VIEW THAT THE DEED OF AN INCOMPETENT MAY BE SET ASIDE AS AGAINST AN INNOCENT PURCHASER IF STATUS QUO CAN BE RESTORED, CANCELLATION SHOULD NOT BE DECREED BECAUSE STATUS QUO CANNOT BE RESTORED.

We believe that this Court will adopt the rule that we contend for: that the executed deed of an incompetent will not be set aside as against an innocent purchaser. But even under the erroneous view which obtains in some jurisdictions[1] *i.e.* that the deed will be set aside if status quo can be restored, the instruments should not be cancelled, because status quo cannot be restored.

1. What the lower Courts did on Status Quo.

Neither the trial court nor the Supreme Court of Hawaii treated their decisions on this question as findings of fact.

The vital question is, of course, a pure question of law: what is the meaning of the rule that unless status quo can be restored, rescission will not be granted? Once that question of law is answered, no difficulty remains in the present case, the relevant facts being undisputed.

The courts below all reached radically different conclusions on the question:

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1. This view is stated by the Circuit Court of Appeals (R. 1603) as follows:

"The rule as stated means that if the parties can be placed in statu quo, the relief will be granted."

The trial court, in its first opinion, said that status quo was restored merely by returning the cash consideration. (R. 138, 159)

In its first opinion, the Supreme Court of Hawaii, having held that rescission should not be granted unless status quo could be restored and that Waialua's extensive improvements were a vital factor, expressed the opinion that all such matters could be ultimately solved in a partition suit. (R. 297-300) It therefore required merely that the $30,000 cash consideration be restored, or secured by a mortgage. (R. 300, 329)

In its second opinion, the trial court ordered that the cash consideration be returned (by being deducted from the judgment for rentals), and that

> "for the purpose of setting at rest equities of the parties in connection with restoration of status quo," (R. 527)

the grantor should (the decree having made her a cotenant with Waialua), permit Waialua to maintain exclusive possession of its improvements until such time as the property might be partitioned, and, upon partition, should permit Waialua to elect, if it chose, to include the sites of the improvements in its share of the land. (R. 527-532)

In its second opinion, the Supreme Court of Hawaii, after a lengthy consideration of the difficulties encountered in any attempt to restore Waialua to status quo (R. 577, 582, 584), decided to alter its former view, and held that in order to restore Waialua to status quo, Mrs. Christian (immediately after re-

ceiving a deed from Waialua to an undivided one-third in the Holt lands), should convey to Waialua all lands upon which permanent improvements rested, and should also convey to Waialua "permanent rights of way for all ditches, flumes, syphons, pipe lines, railroads, roads, electric power lines, telephone lines and other utilities if any, which have been constructed and are being maintained by the W. A. Co. on the Holt lands" (R. 585-586); and that Waialua should in turn convey to Mrs. Christian, rights of way across the rights of way to be granted by Mrs. Christian to Waialua.

2. The Court Below Has Wholly Misconceived the Rule Concerning Status Quo.

Although the court below declared that status quo should be restored, it held that all that was necessary in this behalf was to return to Waialua the price it paid for the land, plus compensation, on quasi contract principles, for the value to the grantor, "the true owner" (R. 1617), of Waialua's physical improvements. It said, in this connection, that restoring the status quo.

> "* * * does not mean that the court should balance all the equities of the parties, as was done by the trial court." (R. 1600)
>
> "It is no legal hardship on the party dealing with the incompetent if he receives back what he gave in the bargain." (R. 1603)
>
> "* * * the status quo of the company may be and was restored by the decree by setting off the $30,-

> 000 purchase price, which the company paid, together with interest, against the accrued rentals to which the ward was entitled." (R. 1606)

On rehearing the court explained its position on the question of restoring status quo, as follows:

> "We used the term 'status quo' in the sense that it meant restoration of what was received under the contract. * * * We believe that such meaning is correct, because the transaction against which relief is granted consists of two things, that is, each party has delivered money or property to the other. The relief returns to each party what he delivered in the transaction. In case one of the parties has by the addition of improvements increased the value of the thing which he must return, then the court may under certain circumstances, grant an allowance to such party for the increase. In a broad sense, the status quo includes both the consideration received and allowance for improvements. * * * However, we treated status quo as restoration of the consideration, and the allowance for improvements as a separate condition. The result is the same whether they be viewed singly or together." (R. 1635-1636)

Thus the court wholly fails to see that return of the price plus compensation for the value of improvements made innocently on "another's land" (R. 1617), does not even touch the question properly to be considered, namely, can the innocent grantee be restored substantially to the condition in which he was prior to the purchase?

The Court Below Repudiates the Idea That Any Account Should Be Taken of Waialua's Irrevocable Change of Position.

The Supreme Court of Hawaii attempted "an equitable restoration to the status quo" (R. 580) by insuring to the grantee the use of the improvements on the Holt lands, on the theory that this would restore Waialua to status quo with respect to the improvements both on and off the Holt lands, speaking as follows:

> "These provisions * * * are intended to assure the W. A. Co. restoration NOW in this suit, to it of the improvements which it has constructed and is maintaining on the Holt lands as well as the continued use and benefit of those which it has constructed off of the Holt lands." (R. 588)

This obviously does not even approximately restore Waialua to status quo; but even this limited and unsuccessful attempt to save Waialua from the irreparable harm that will result if the instruments are annulled, was flatly repudiated by the court below.

After referring (R. 1616) to this action by the Supreme Court of Hawaii, the court below said that this was incorrect; that in such cases the grantee is entitled only to receive compensation to the extent that the "true owner" of the land is enriched by physical improvements. (R. 1617) In other words, the effect of the decree on the grantee is irrelevant.

The Court Below Did Not Consider the Question Whether Status Quo Can Be Restored.

The court below held that status quo could be restored, because the Supreme Court of Hawaii had so found, "because we cannot say there was clear error, since the evidence was at most only conflicting". (R. 1606) It made no examination of the question itself, but merely accepted the declaration of the Supreme Court of Hawaii, which it treated as a finding of fact, when it was a pure question of law, there being no dispute as to the facts themselves. By thus adopting without discussion or examination the conclusion of the Hawaiian court, the court below not only misapplied the law, but deprived Waialua of the review which it was the right and duty of the court below to give.

And as we have just seen, the court below, having relied on the Supreme Court of Hawaii's declaration that status quo could be restored, repudiated the basis upon which that court had made its declaration.

3. Restoring a Party to Status Quo Means Saving Him Harmless.

We need not labor the proposition that the rule forbidding cancellation of an executed conveyance to blameless grantees does not mean merely that the consideration must be restored (as held below), nor merely that, plus the value of physical structures. It means that such grantees must be substantially "reinstated in the condition in which they were prior to the purchase". (*Yauger v. Skinner*, 14 N. J. Eq. 389.)

Even in cases of rescission for fraud, the same rule is applied, with appropriate exceptions, because inherent in the idea of rescission. (*Neblett v. Macfarland*, 92 U. S. 101.)

And as against defendants who are without fault, the rule is unqualified, that executed transactions will not be set aside unless it can be done without harm to the innocent party against whom the relief is sought.

This for the obvious reason that to grant rescission in such a case would be to do something that equity never does: "a court of equity will not transfer a loss that has already fallen upon one innocent party to another party equally innocent." (*Holly v. Missionary Society*, 180 U. S. 284, 295.)

A fortiori, in cases like this one, where the bargain was fair, and plaintiff has suffered no injury whatever, equity will not annul an executed transaction, where to do so would inflict great and irreparable harm.

A leading case is *Grymes v. Sanders*, 93 U. S. 55, 62, where, in considering whether a conveyance should be rescinded at the suit of the buyer on the ground of a mistake of fact, the court said, speaking of rescission generally,

> "A court of equity is always reluctant to rescind, unless the parties can be put back in statu quo. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it. Here the appellant re-

ceived the money paid on the contract in entire good faith. He parted with it before he was aware of the claim of the appellees, and cannot conveniently restore it. * * * Times have since changed. There is less demand for such property, and it has fallen largely in market value. Under the circumstances, the loss ought not to be borne by the appellant."

Mr. Pomeroy states the principle thus:

"In cases of fraud, if the defendant's act has prevented a complete restoration of the status quo, he cannot, in justice, urge this fact as a defense to the rescission; but in other cases, such as mistake, it would seem reasonable that the status quo should be completely restored as a condition of equitable relief." (5 *Pomeroy, Eq. Jurisp.* (4th Ed.) Sec. 2110.)

In *Price v. Berrington*, 3 Mac. & G. 486, the principle is applied in a case much less obvious than the present one. There the court refused to set aside an incompetent's conveyance where,

"* * * the consideration being fair, there being no notice of insanity and no circumstance of fraud, the estate having also been enjoyed during the twenty-seven years since the conveyance, and made the subject of family arrangements by settlement upon the marriage of the daughter of Moggridge (the grantee), under which her children are entitled to the benefit of certain charges upon the estate. (p. 495) * * *

"The purchaser, having acted bona fide, dealt with the estate believing it to be his own, made

important family arrangements upon that footing, the disturbance of which would, I think, be not only highly inconvenient, but unjust." (p. 497)

In *Watson Coal & Mining Co. v. Casteel,* 68 Ind. 476, where it was sought to cancel a lease of a coal mine on the ground of fraudulent representations that the land contained a vein of coal which was of sufficient extent and thickness to justify more or less extended mining operations, the court refused to set the lease aside on the ground that the parties could not be placed in statu quo, saying (p. 481):

"There are well settled rules governing the rescission of contracts: The party against whom rescission is sought must be in fault; both parties must be placed in statu quo; the party asking rescission must return or tender what he has received under the contract, and rescission must be promptly sought.

"The facts averred do not fill these requisites. Admitting that the mistake alleged against the plaintiff is a fault on his part which might authorize a rescission of the lease, yet it is very clear the parties can not be placed in statu quo. The defendant has mined quantities of coal from the land, and paid certain instalments of the royalty thereon for twenty months, and has changed the condition of the land by his mining operations to such a degree that it has become impossible to return the coal he has mined, or restore the land to the condition it was in when the lease was made."

See discussion in *Snow v. Alley*, 144 Mass. 546.

See also:

Riggan v. Green, 80 N. C. 236;
Gill v. Dingfelder, 224 Mich. 247;
Buckner v. P. & G. E. Ry., 53 Ark. 16;
Rice v. Wilson, 225 Fed. 159.

In *Rickman v. Houck*, 192 Ia. 340, specific performance of a contract to sell real estate was decreed against an incompetent vendor, where the purchaser had changed his position in reliance upon the contract by making other contracts for the purchase of lands adjoining that of the incompetent vendor. The court held that a return of the purchase price did not accomplish restoration to status quo:

> "Ordinarily in a case of this kind, the returning of the cash payment would place the injured party in the condition that existed prior to the making of the contract. Not so in the instant case. It would not compensate them for their inability to carry out their enterprise in which they invested a large amount of money." (p. 349)

In *Dent v. Long* 90 Ala. 172, cancellation of a deed conveying certain lands in Alabama was denied because of the purchaser's change of position, the court holding:

> "Unless the parties can be put in statu quo, which cannot be done when a portion of the property has been disposed of, a court of equity is reluctant to rescind a contract and will do so only when clear and strong equity compels it * * *

in the meantime two railroad companies have acquired right-of-way over the lands and Long has put improvements thereon of value from $15,000. to $20,000. Upon the facts disclosed by the record the objections to the rescission of the contract and cancellation of the conveyance are insuperable." (p. 177)

Again, in *Piedmont Land & Improvement Co. v. Piedmont Foundry & Machine Co.*, 96 Ala. 389, certain property was deeded to defendant for the operation of a factory as a part of a general scheme of improving a town. Defendant agreed to operate the plant for two years, but became heavily indebted after a few months and could not do so. A cancellation of the deed was sought and, in denying rescission, the court said:

"If there has been part performance of the contract, that is, to such an extent that the status quo can not be restored, then no rescission can be claimed." (p. 393) * * *

"* * * the bill does not negative the fact that these benefits did, in fact, accrue to appellant from the construction and operation of appellee's manufacturing establishment. From these facts it is quite manifest that, if a rescission should be decreed by the court, it would not be practicable for the parties to be put in the situation they occupied when the contract was made. What has been said disposes of the bill in so far as it seeks a rescission of the deed." (p. 394)

4. Waialua Cannot be Restored to Status Quo; Therefore, the Challenged Instruments Should not be Cancelled.

The transactions here challenged should not be disturbed since intervening events have made it wholly impossible to restore Waialua to status quo.

The Status Quo Existing at the Time the Deed was Executed (May 2, 1910) Cannot be Restored for the Reason that a Fortuitous Event has Happened Whereby the Interest Conveyed has Ripened into a Fee Simple Title.

A conclusive defense to this whole suit lies in the fact that Waialua cannot be restored to the position it occupied prior to the conveyance. It purchased a contingency at a fair price; now, after the event has happened (the death of Mrs. Christian's father), it is too late to rescind the transaction.

Thus far, we have been discussing this question as though Mrs. Christian conveyed land to Waialua in 1910. She conveyed neither land nor any vested interest in land, but a contingent remainder dependent upon her surviving her father, the life tenant.[1] Had Mrs. Christian not survived her father, we would never have heard of this case, for then the risk that Waialua took (that it might never receive the fee

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1. The contingent nature of the interest was described by the Supreme Court of Hawaii as follows:

> "If she (Mrs. Christian) predeceased him (John D. Holt) the fee simple interest upon his death would vest in his heirs at law then living. In this event the Waialua Company would get nothing by its deed nor would it be able to recover the consideration which it had paid * * * it was not beyond the range of

title) would have turned out greatly to the benefit of Mrs. Christian and her estate. Now that later events have determined that Waialua's contingent interest ripened into a fee simple title by the death of Mrs. Christian's father (twelve years after she executed the deed) she and her relatives seek to rescind the transaction and to obtain, not the contingent interest which she conveyed, but a present vested fee simple title; not a contingent interest in a partially improved property but a vested fee in a highly improved and successful sugar and pineapple plantation.

We have already pointed out that all courts are agreed that in a case of cancellation no relief can be granted unless the grantee can be restored to the status quo.

We have shown that a restoration to status quo does not mean a mere return of the consideration plus an allowance for improvements (as the court below has held), but means that the situation presently before the court must be such that the grantee can be placed in substantially the same position that it occupied before the conveyance was made; otherwise, equity will refuse cancellation. (*Grymes v. Sanders,* 93 U. S. 55, 62.)

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probability that he would adopt children who under the law would also become his heirs. Even, therefore, if Eliza survived him there might be other heirs with whom the fee simple estate would have to be shared. * * * In 1918 John D. Holt did endeavor to adopt the Kentwell children—six in number—and his effort failed solely for the reason that the proceedings were not in accordance with Hawaiian statutes." (R. 304, 305)

A leading case upon this subject is ***Molton v. Camroux,*** 2 Ex. 487, 4 Ex. 17. In that case a lunatic purchased an annuity and died before the insurance company had made any payment under its contract. The lunatic's executors endeavored to avoid the contract on the ground of insanity. The court held that an executed transaction, fairly entered into with the incompetent by a person without notice, was valid and that this rule applied:

> "* * * * especially where the contract is not merely executory, but executed in whole or in part and the parties cannot be restored altogether to their original position." (p. 19)

The insurance company, after entering into the contract and receiving the lump sum deposit, ran the risk that the annuitant might live for many years and it would have been obliged to continue payments under the contract according to its terms. After the fortuitous event happened, *i.e.* the death of the lunatic, it was then too late to avoid the bargain.

The attempt to cancel the conveyance of a contingent interest in property after the fortuitous event has happened is analogous to an attempt to cancel an aleatory contract after the fortuitous event has turned out unfavorably to the person seeking cancellation. In such instances it is well settled that the contract cannot be cancelled. 2 *Restatement of Law of Contracts,* Sec. 486:

"POWER OF AVOIDING AN ALEATORY CONTRACT FOR INNOCENT MISREPRESENTATION.

The power of avoiding an aleatory contract for innocent misrepresentation that does not make the risk of a party induced thereby to enter into the contract seem less than it is, is lost if after the formation of the contract but before manifestation of an intent to exercise the power,

(a) a fortuitous event has already happened on which depends the duty of the party seeking to avoid the contract, or * * *"

"Comment: (a)

* * * In most contracts a restoration of the consideration substantially restores the status that existed before the contract was entered into. This, however, is not always true in case of aleatory contracts. Where the fortuitous event has happened or has become either more or less likely to happen than when the contract was entered into, the status cannot be restored."

It is idle to say that the return of $30,000.00 plus an allowance for improvements, places Waialua in the position it was in prior to the execution of the deed of May 2, 1910. Up to the time of John D. Holt's death in 1922, Waialua held a contingent remainder which might be defeated by the death of Mrs. Christian during her father's lifetime (and the father did live for 12 years after the deed was delivered), or partially defeated by the introduction of additional heirs. The Supreme Court of Hawaii summed up this risk as follows:

> "Even therefore if Eliza survived him, there might be other heirs with whom the fee simple would have to be shared. In this event, Eliza's interest would be correspondingly diminished and what the Waialua Company obtained from her would to the same extent be diminished. In 1918 John D. Holt did endeavor to adopt the Kentwell children—six in number—and his effort failed solely for the reason that the proceedings were not in accordance with Hawaiian statutes." (R. 305)

The effort was not really an effort so much on the part of John D. Holt, as it was on the part of Mr. and Mrs. Kentwell, who executed an adoption agreement with John D. Holt before the American Consul on June 12, 1918 (R. 1360) whereby John D. Holt adopted their children "as his own children with all rights and privileges unto them belonging as if they were the natural children of the said party of the first part, including the right to inherit as his heirs at law" and they (the Kentwells) released all parental control and rights over their children. Fraud would seem to be a kind word to use to characterize this "adoption" but it does illustrate the essentially contingent nature of the interest which Waialua acquired through the deed of 1910.

During the years from 1910 to 1922, Waialua had parted not only with the purchase price, but had also assumed the risk of survivorship and of losing the whole estate, or of having the estate cut down by the adoption of children. Waialua paid $30,000 to Mrs.

Christian not for the estate, but for the possibility of acquiring it.

The advisers of Mrs. Christian (who joined in her deed in 1910) have stood by all these years, and now that fortuitous events have happened, making it more favorable to Mrs. Christian to undo the transaction, they come to a court of equity and seek to repurchase for the same sum of $30,000 (the fair price of her contingent interest) not the contingency which Waialua bought in 1910, but the absolute vested interest which it subsequently acquired.

A contention similar to that advanced here by Mrs. Christian came before Lord Hardwick in the case of *Nichols v. Gould*, 2 Ves., Sr. 422, where there was a life estate followed by an entail to the life tenant's sons. The life tenant was unmarried and had no sons. The owner of the reversion sold it. The life tenant died a month after the sale, so the grantee had the property in fee. The reversioner then sought to set aside the deed. Cancellation was denied.

As this court has said, "cancelling an executed contract is an exertion of the most extraordinary power of a court of equity." (*Atlantic Delaine Co. v. James*, 94 U. S. 207, 214) It is now asked, not only to exercise that extraordinary power, but to do so in direct violation of fundamental principles of equity. We earnestly contend that, independent of every other issue in this cause, assuming Mrs. Christian ever had any right of cancellation (which we deny) that right disappeared upon the happening of the fortuitous event which vested the title in Waialua.

The authorities are agreed that where a contract or executed conveyance, the performance of which or the benefit of which depends upon the happening of a fortuitous event, is subject to an equitable right of rescission, such contract or conveyance cannot be set aside after the fortuitous event has occurred, in the absence of fraud which increases the risk. This principle of equity is simply the application of an ordinary rule of fair dealing.[1]

This principle is illustrated in the case of *Breed v. Judd,* 1 Gray 455. In that case Breed, a minor living in Massachusetts, decided to go to California to try his luck in the gold rush. Lacking funds, he secured the backing of the defendants, promising to pay them one-third of the gold he might discover. Breed went to California and discovered gold, and then endeavored to avoid his bargain on the ground of infancy. He offered to repay Judd the cost of the outfit. The Massachusetts court, in denying rescission, said:

> "The case has been argued as if the gold-dust were the result of the plaintiff's labor alone, whereas it was the result of the union of the labor of the plaintiff and the capital of the defendants.
>
> "The offer of the plaintiff to deduct from the sum to be recovered the amount paid for his outfit and expenses would not place the parties in

1. The Circuit Court of Appeals held that court should not "balance all equities of the parties" (R. 1600); i.e., the deed should be set aside even if it is inequitable to do so.

statu quo. The defendants took the risk of the life, health, and good fortune of the plaintiff. If the enterprise had wholly failed, they would have had no claim upon the plaintiff for remuneration and the capital advanced would have been wholly lost. To make the defendants whole, they must be compensated for the risk assumed, and under all the circumstances of the case the sum advanced was deemed a reasonable consideration for a third part of the proceeds of the plaintiff's labor." (p. 457)

In *Mutual Life Insurance Co. v. Smith,* 184 Fed. 1, the court held an insurance company could not be restored to status quo after it had sold an annuity policy, by the cancellation thereof.

And in *Williams v. Penn Mutual Ins. Co.,* 6 Fed. (2) 322, 323 (affirmed 27 F.(2d) 1), the court held that "* * * Where a defendant has foregone or lost a right to which it cannot be restored on the cancellation of an agreement procured by fraud, a court of equity will not decree cancellation", and refused to cancel a life insurance settlement agreement alleged to have been procured by fraud, because the year during which the insurance company was entitled to contest the policy had expired. and the policy had become incontestable by the insurance company.

Neither the Circuit Court of Appeals nor the Supreme Court of Hawaii discuss the question of status quo upon cancellation of a conveyance of a contingent interest after the contingency had occurred. The Circuit Court of Appeals did not mention the fact that

what Mrs. Christian sold was a contingency and what it decrees Waialua to reconvey is a vested interest. Indeed a cursory reading of the opinion would convey the impression that the deed which it ordered cancelled, was a conveyance of a vested interest in property. Certainly no consideration was given by the court below to this point.

As we have said before, assuming that an equitable right of rescission arose by reason of the incompetence of Mrs. Christian as against an innocent purchaser who paid a fair price, (contrary to the view of the English decisions and the better reasoned American decisions) that equitable right is lost upon the happening of the contingency upon which the estate depended.

The Land has been Incorporated as an Integral Part of the Plantation, it has Greatly Increased in Value, Large Sums have Been Expended on the Land, and Large Sums off the Land. Obviously Status Quo Cannot be Restored.

We now state the essential facts showing how irrevocably Waialua has changed its position in reliance on its title. These improvements are so extensive that it required 99 pages of the decree of the Supreme Court of Hawaii to discribe them. (R. 635-734)

The expenditures of Waialua for the improvement of the Holt lands segregated as to periods may be summarized as follows:

From April 1, 1905 (when lease was made) to May 2, 1910 (when deed was made)	$182,525.07
From May 2, 1910, to April 10, 1922 (when fee vested)	203,513.43
From April 10, 1922, until April 5, 1928 (when deed was first questioned)	244,683.62
Total	$630,722.12

(R. 1507, Ex. S-5)

These expenditures were made by Waialua in the belief that it had acquired by the questioned instruments, the various titles which they purported to convey. Obviously if it had the slightest doubt of their validity it would have made none of these outlays.

Not only were large expenditures made on the Holt lands themselves, but large expenditures were made on other lands for the benefit of the Holt lands. The plantation was developed as a unit, and all plantation improvements were planned and designed as to location and capacity upon the basis that the Holt property was an inseparable part of the whole.

The Wahiawa reservoir was built off the Holt lands, which receive 1/3 of its waters. Without those waters sugar could not be successfully grown on the Holt lands. This dam and reservoir cost:

Dam and spillway	$448,555.94
Ditch	66,039.00
Total	$514,594.94

(R. 1515-1516, Ex. S-5, S-6)

The more important of these improvements off the Holt lands are briefly described by the Supreme Court of Hawaii, as follows:

> "* * * large and costly improvements had been constructed by the W. A. Co., in reliance upon the deed of 1910, on lands other than Holt estate lands. More specifically * * * the reconstruction in 1921 by the W. A. Co. of the Wahiawa dam and the creation thereby of a reservoir extending back into the mountains for a distance of several miles along both the north and the south forks of the Kaukonahua stream and covering about 300 acres, the reconstruction in 1931 costing the company the sum of about $210,000. * * * [Also] the construction of a ditch more than four miles in length to lead the waters from the Wahiawa dam to the cane lands of the W. A. Co., including lands of the Holt estate as well as other lands of the company. Similarly, * * * the establishment of the Poamoho pump by the W. A. Co. on grant 235 belonging to the Holts but with ditches and pipe lines (on non-Holt lands) through which the water raised by the Poamoho pump was forced and carried to cane fields both on and off the Holt lands." (R. 578)

Nature and Extent of Improvements on Holt Lands.

With the exception of the partial use of a plantation railroad, and of some of the roads, which are used to reach the pineapple area, all of the improvements on the Holt lands are used in connection with the cultivation, irrigation and transportation of sugar cane—that is, in connection with sugar and not with pineapples.

As will be seen from Ex. S-3, (attached to this brief) the waterways, railroads, roadways, electric lines etc. honeycomb the entire plantation, like the arteries of a body, and like the arteries of a body all radiate from and into the heart of the plantation: the sugar mill. The Holt properties are part and parcel of the plantation whole, just as the mid section of a human body is a part of that body. No boundary exists between the Holt lands and other plantation lands; the boundary is an imaginary line and the sugar fields, the waterways, the railroads and the other improvements cut across this imaginary boundary as though it were not there.

The improvements on the Holt lands are segregated as follows:

Buildings.

The buildings on the Holt property, built by Waialua, consist principally of the houses necessary to accommodate laborers. There are ten separate groups of laborers' quarters in all, containing a total of eighty-two houses and furnishing accommodations for a total of 205 laborers. (R. 1530 et seq.) A domestic water supply is provided with a comprehensive system of piping. All the water for all of the quarters, save four, is supplied from a common source. Pump No. 3, located off the Holt property on the Bishop Estate lands. (R. 1532)

While these buildings are located upon the Holt lands, the laborers living in them work generally upon the plantation as their services may be required the

camps being located geographically with a view to the most economic use of the laborers for plantation purposes. (R. 1494)

Water Supply.

The sources of the water supply for the cane lands on the Holt lands may be segregated under three headings: (a) Helemano waters; (b) Wahiawa waters; and (c) pump waters. The record shows that the growing of cane on the Holt lands would be impossible if the only water available was that originating on the lands themselves. The cultivation of dry-land cane proved to be a failure, and the cultivation of cane above the Wahiawa ditch extension proved uneconomical. (R. 1243) Nor would the growing of cane on the Holt lands be possible even with the use of the waters originating on and appurtenant to the mountain lands (Bishop lands and Territorial School lands leased to Waialua) supplemented by pumping, for the supply of mountain water is intermittent and not to be depended upon, and the pump water although essential is too costly to be used over long periods. The profitable cultivation of the sugar land on the Holt property is only possible by the use of water from all three sources.

(a) *Helemano Waters.* This term is not used to identify waters originating on the Holt lands, but to indicate waters originating on mountain lands (leased by Waialua for water purposes from the Bishop Estate lands and the Territory), which waters are caught just below the upper boundary of the Holt lands by a

system of ditches and impounded in a system of reservoirs located principally, upon the Holt lands. (R. 1498) From these ditches and reservoirs the waters find their way, depending upon the manner of their dispatch, onto the Holt lands, onto other Waialua lands, or into the Wahiawa extension ditch. The waters which find their way into the Wahiawa extension ditch are mingled with the Wahiawa waters, lose their identity and are used on the Holt lands, the Bishop Estate lands lying north of the Holt lands, and on other plantation land, without distinction as to source. (R. 1499)

Eleven reservoirs, ranging up to a capacity of 148,000,000 gallons, are required in connection with the system. Five siphons, built mostly of steel and cast iron, are required to convey the water across various gulches, some of which are as deep as 250 feet; some of the siphons being as large as 54 inches in diameter. (R. 1543 et seq.) Ditches are required to carry the water from the points of diversion into the reservoirs and from them to the place of use. These ditches are built principally of natural soil, but portions of them are lined with stone and concrete, and flumes are required to carry them over the small ravines. The total length of the main ditches, which are located entirely on Holt lands, is in excess of 89,480 feet, or more than seventeen miles. The minor waterways, permanent in nature, required to carry the water from the main ditches onto the Holt lands, aggregate ten miles in length and cost $29,207.73. Many of these waterways are lined with concrete and stone. The expenditure on

the Holt lands, for reservoirs, ditches and siphons exceeded $110,000.

The reservoirs, ditches and irrigation works are not confined to the Holt sugar lands, but gridiron the entire area, including the area devoted to the growing of pineapples.

(b) *Pump Waters.* The supply of gravity waters, including the Helemano waters and the water from Wahiawa reservoir, proving insufficient, it became necessary to provide additional pump water as a protection against lack of water at critical periods, so it was decided in 1926 to build a large, highlift pump. (R. 1553) As pumps were located on practically all of the streams, with the exception of the Poamoho, it was determined to locate the pump on that stream. Mr. Bischoff was instructed to locate the pump on fee simple land, and with this in view located it on Holt lands (R. 1553), believing that to be fee simple land.

The pump was designed to supply water in two lifts, the higher at a 380′ head and the lower at a 190′ head (R. 1500), the water to be used on Holt lands and on other lands of the plantation; the total area to be irrigated aggregating somewhat over 1,000 acres, of which approximately one-half were Holt lands.

The work of building the pump, wells and appurtenant machinery was commenced after its location was fixed in November, 1926, and was completed in April, 1928, at a total cost of $212,871.67. (R. 1507) The wells, twelve in number, cost $42,860.00. The total pump horse power is 1,050.

The electricity for the pump is supplied from three sources, the Kemoo power plant, located on the Wahiawa ditch, the plantation mill power plant, and the Hawaiian Electric Company, when the supply from the first named sources proves insufficient. (R. 1502).

The main pump, located in a concrete chamber 50 feet below the surface of the ground, is located entirely on the Holt lands, but the main discharge pipes, which are integral parts of the pump, are located partly on Holt lands and partly on other lands. (R. 1554)

Included in the installation is a domestic pump, all of the water of which is used on lands other than Holt lands.

(c) *Wahiawa Reservoir and Ditch.* Without the development of the Wahiawa reservoir water and bringing it to the Holt lands the growing of sugar cane on the Holt lands would be impossible. The continued growing of cane on the Holt area is dependent upon the continued supply of water from the Wahiawa reservoir. The Wahiawa reservoir dam, reservoir and spillway are located entirely off the Holt lands, with the exception of a portion of the reservoir area. Its waters are carried from the dam by a series of tunnels and ditches across the Waialua plantation, through the lands lying south of the Holt lands, northerly through the Holt lands onto the Bishop Estate lands, being used along its entire course for irrigation purposes.

$66,039.13 was spent in the construction of the Wahiawa ditch, which carries the water from the Wahiawa dam onto the Waialua plantation lands. (R. 1516, S-8)

(d) *The Method of Use of Waters.* The testimony shows that the waters from all sources, Helemano, pump and Wahiawa, are used indiscriminately for plantation purposes without distinction as between their place of origin and their place of use. Mr. Bischoff testified as to the manner of use of the water as follows:

> "The general practice is for each section luna (being the man in charge of a certain area of cane land) to estimate the needs of his water for the next day to see what he has on hand of his own supply. To take a specific example: the man at Kawailoa section would probably call up the man at Opaeula and say, 'I need so much water,' in terms of the unit of one-man water; then the man at Opaeula would estimate his needs and his own supply, and add onto it the supply he has to deliver to Kawailoa below. The Opaeula man would call up the man in the Helemano section, where the section luna there will go through the same process and then will get in touch with the man in the Kemoo section. The Kemoo man, having water from only one source (the Wahiawa reservoir) then estimates his own needs and adds on the supply called for from the last section, and consulting with the assistant manager, puts in the order for the supply of water to be turned on the next morning.

"When the Wahiawa reservoir is at a certain level—approximately about half full—there is a limit on the amount of water that can be drawn, and if there is more needed, we go without that water. Then the pumps are started. Every night there is an inventory of all the water on hand made under the supervision of the plantation officials. On that inventory, based upon whether water is available at certain places, the use and amount of water to be used the next day is determined. There is then no discrimination or distinction as between sources of water as to where it is used; all is mingled." (R. 1557 et seq.)

Mr. Bischoff testified that about one-third of the Wahiawa waters were used on Holt estate lands, about one-third on the lands north of the Holt estate lands, and about one-third on the lands lying south. (R. 1504) He further testified that on the Holt lands it would be impossible to tell the source of the water, whether it was Helemano waters or Wahiawa waters; and the same was true as to the Bishop lands. (R. 1502) This shows that the water supply for the plantation has been developed as a unit; that the waters gathered at the upper end of the Holt lands (belonging to Waialua by virtue of its Bishop and Territorial leases) is used not only on Holt lands but other lands; that the Wahiawa water mingles with the Helemano waters and pump waters and its place of use cannot be identified; that it is not only used on Holt lands, but on other lands.

All of the reservoirs shown on Exhibit S-5 (R. 1507) are located on Holt lands, with the exception of

Helemano No. 15 reservoir, which is located partly on the Holt lands and partly off, the water impounded in it coming partly across Holt lands but being used entirely off the Holt lands.

Railroads.

A total of 9.75 miles of railroad has been constructed on the Holt lands. (R. 1533) Of these, approximately 2.75 miles were abandoned in 1923 in connection with the making of the lease to the Hawaiian Pineapple Company. (R. 1535) The railroad crosses the Holt boundary in eight different places, its location making no distinction between Holt lands and other lands, it being placed in the most desirable location, considering the topography. Of the total mileage, somewhat less than a mile in length consists of main plantation railroad, passage over which is necessary in order to reach the Bishop lands lying to the north. The main line and the branch lines are of the same character of construction and a portion of the line is required in connection with the pineapple lease, there being no access between the pineapple area lying north of the Helemano Gulch and that lying south, thus necessitating the carriage of pineapples down to the main line of the Oahu Railway and Land Company over the Waialua Plantation Railroad. (R. 1536)

Roads.

There are twenty miles of roads and one mile of fences on the Holt lands. (R. 1547) The roads through the pineapple property were built by Waialua. All roads including those on the pineapple property cross

and re-cross the Holt boundary at many points without distinction as to ownership.

Electric and Telephone Lines.

There are four and one-half miles of electric power lines located upon the property. (R. 1548) The portion upon the Holt lands constitutes a part of the integrated power transmission system running throughout the entire plantation, the sources of power being the Kemoo Hydro-Electric Plant and the plantation mill plant, supplemented by power from the Hawaiian Electric Company. The electric lines reach all of the camps located on the Holt lands. The telephone lines are equally comprehensive and extend to each of the camps and reservoirs on the Holt lands.

Clearing Lands.

The total direct cost (not including indirect costs) of clearing the cane lands was $47,483.89. It was necessary to expend substantially all of this sum before the work of planting or cultivation could be commenced.

The Increase in Value of the Property is an Additional Reason why the Status Quo Cannot be Restored.

In 1910, Mrs. Christian was paid $30,000, a sum found to be the fair price of her contingent interest in the property. Since that time the property has greatly increased in value. As a result of the skill, energy and improvements by Waialua, and the development of the pineapple industry, the value of the land today greatly exceeds its value in 1910. For the

$30,000 paid by Waialua in 1910 it received a contingent interest in property which the court found was fairly valued at $30,000. Today, 28 years later, Waialua is ordered to reconvey to Mrs. Christian property which her counsel say is "worth millions". The Supreme Court of Hawaii held the fact that the property had greatly increased in value was immaterial. (R. 294)

The Circuit Court of Appeals made no mention of the fact that the property had increased greatly in value. We contend that this fact is an added reason why it would be inequitable to cancel the instruments. Even in cases involving fraud, where there has been a great increase in value, relief in equity will be denied.

Felix v. Patrick, 145 U. S. 317. In this case the defendant obtained title to certain land purchased from an Indian, to whom scrip had been issued pursuant to an Act of Congress. The device resorted to had the effect of impressing a trust in favor of the Indian upon the land. Many years later suit was brought for the recovery of the property which, in the meantime, had increased greatly in value. This Court, however, refused to decree cancellation upon the ground that the relief sought was wholly disproportionate to the wrong:

> "The real question is, whether equity demands that a party, who, 28 years ago, was unlawfully deprived of a certificate of muniment of title of the value of $150 shall now be put in possession of property admitted to be worth over a million

* * * In a court of equity, at least, the punishment should not be disproportionate to the offense, and the very magnitude of the consequences in this case demands of us that we should consider carefully the nature of the wrong done by the defendant in acquiring the title to these lands." (p. 338)

See also:

Wetzel v. Minn. R. R. Transfer Co., 169 U. S. 237;

Grymes v. Sanders, 93 U. S. 55.

If a great increase in value is sufficient to permit a court to deny equitable relief in the case of a fraudulent purchaser, *a fortiori* a court of equity should refuse relief against an innocent purchaser.

cf. 5 Williston op. cit. Section 1594.

Copps v. Clark, 196 Ia. 758, 764:

"It is equally true that a court of equity has power to rescind an executed contract, but it will not do so if the rescission operates inequitably upon an innocent defendant."

The point is illustrated in *Hanner v. Moulton*, 138 U. S. 486, 495; where action was filed to set aside the sale of a land certificate and the court said:

"An interval of nearly thirteen years elapsed between the sale of the certificate and the filing of the bill in this suit. The value of the property has largely increased. Parties interested and witnesses have died, and the memory of those who

> survived has decayed. Not a person who is now interested in any of the land is implicated in the fraud charged in the bill. Under the facts above stated, the plaintiffs have been guilty of such laches that they cannot have any relief in a court of equity."

In *Towart v. Sellars*, 5 Dow (H. L.) 231, it was sought to set aside a deed on the ground of the mental incompetence of the grantor. Action was brought in 1808. The lower court found in favor of the petitioner, but in 1817 the House of Lords reversed the decree, with Lord Eldon and Lord Redesdale giving opinions. As one reason for dismissing the bill, it is stated (p. 246):

> "The length of time too that elapsed from 1784 to 1807 was to be considered. The value of the property might have trebled in that time, and yet Towart was suffered to remain in possession, managing and disposing of it as his own; and the effect of this decision is to impeach all these transactions. If then the consideration was equal to the value of the property in 1784, would it be justice to put an end to the transaction in 1807 or 1808, when the value was so different?"

As this Court said in *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587:

> "No delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain, or

rescind it, is allowed in a court of equity." (p. 592)

* * *

"The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit." (p. 593)

Mrs. Christian (and her relatives who joined in the deed, holding her out to the world as competent) has not only stood by while Waialua converted a barren waste into a profitable plantation, but also awaited the happening of the fortuitous event upon which her contingency depended and "not until all the hazard was over" and Waialua's "skill, energy and money" had made the purchase profitable "as any claim or assertion of right in the property made." (*Twin-Lick Oil Co. v. Marbury*, supra.)

The Intervention of Many Active Years Shows of itself that Status Quo Cannot be Restored.

Quite apart from the foregoing matters the fundamental fact is that during the eighteen years that intervened between the delivery of the deed and the commencement of this suit, the grantee was engaged continuously in the development of a large and highly organized and equipped plantation, of which the lands in suit are an inseparable part. It is apparent that countless decisions have been made, countless steps taken once and for all, which would have been very

different except for the grantee's justified belief that the transactions now attacked were unassailable.

Quite apart, therefore, from the central fact of the intricate and inseparable relation which the land in suit has come to have physically to the grantee's other property and affairs, the effect of divesting the grantee's title will be this: that innumerable things that were done wisely and well should have been done differently, or not at all. The grantee will thus be injured in a thousand undiscoverable (but unquestionable) ways in addition to the great and obvious injuries which appear on the face of the physical facts.

Moreover, changes in external conditions have occurred by virtue of which the setting aside of these instruments would effect grave injustice. The land has increased in value, both from the efforts and expenditures of the grantee and from other causes, described by the Supreme Court in general terms as "more profitable development of the sugar industry, a large and more competitive market and the acquisition * * * of the fee simple estate." (R. 294)

The difficult problem of obtaining the great quantities of water necessary in the cultivation of sugar (R. 1457, 1461) was not solved for many years. (R. 1496, 1505, 1507) The development of caterpillar tractors, motor trucks, and many other devices has materially changed the nature of the industry (R. 1386), as has the discovery of new fertilizers (R. 1386-7), and new methods of controlling pests. (R. 1257) And as pointed out by the Supreme Court, in 1906,

"* * * it was not known to any of the parties or to any one else, that pineapples could be successfully or profitably grown on the upper lands of the Holt estate. It was not until about fifteen years later that the W. A. Co. was able to lease the upper lands for pineapple purposes * * *". (R. 559),

i.e., not until 1923. (R. 973)

The fact is, therefore, that the property now sought to be taken from the grantee simply is not the same property as that received by it in 1910. Indeed, taking account of all that has occurred in the interim, it bears almost no resemblance to the property received, either physically or functionally.

In 1910, Mrs. Christian's contingent remainder was a minor part of the raw material which Waialua was in the process of assembling in furtherance of a large and difficult development of a new enterprise; attended with all the uncertainties and risks that confront any such venture.

That interest is now merged into a large going concern. If it is now taken away, with it go the fruits of the grantee's skill, energy, risk and expenditure to which the grantor contributed nothing.

To say, as the court below did, that all that need be done now to restore the status quo is to undo the exchange of title and price in 1910, is, we submit, an absurd result of wholly mechanical reasoning.

5. The 1905 Lease Has Expired. It is Utterly Impossible to Restore Status Quo if it is Cancelled.

The question of the cancellation of the 1905 lease does not arise unless the 1910 deed is cancelled. For the reasons already advanced we believe this Court will agree that the deed should not be disturbed. However, in order that the situation may be presented, we discuss it briefly at this time.

At the first trial the grantor attacked only the 1910 deed. The Supreme Court of Hawaii quite properly pointed out that even though "the deed falls, the Waialua Company had a perfect right to claim that its possession was justified by the lease" (R. 314), and hence no rentals would be due from Waialua until the term of the lease expired on April 1, 1930.

The decree of the Circuit Court of Appeals having directed the cancellation of the 1910 deed, remanded the cause for a trial of the issue of Mrs. Christian's competency on the date of the execution of the lease (March 17, 1905), with directions that in the event she is found incompetent, the lease be cancelled and an accounting had for rentals. This lease (R. 874) was for a term of 25 years from April 1, 1905. It was first sought to be cancelled two years after the term had expired. It is difficult to see how a lease which has already expired can be cancelled and more difficult to see how the *status quo* can be restored. This anomalous result can only be accounted for by the adoption of the "void" rule and the court's refusal to consider the equities of the parties.

The trial court refused to take evidence on the issue of competency of Mrs. Christian in 1905 upon the theory that the findings on the former hearing included that issue. The Supreme Court of Hawaii recognized the error of this, but held that incompetence on the date of the execution of the lease, even if proved, was insufficient to warrant cancellation of the instrument. The reasoning of Chief Justice Perry is unassailable. After detailing the circumstances surrounding the execution of the lease, the number of parties to it, and the fact that the lessors were represented by agents and counsel of integrity and ability, the Chief Justice says:

"If her interest had vested soon after the date of the lease, Eliza had no funds with which to pay the accruing taxes. She, as well as other lessors, were in some danger of losing their title and interests through enforcement of the government's claim for taxes, past and future. We think that Eliza's joinder in the lease was wise and beneficial. It enabled her to secure support and maintenance for herself, as will more clearly appear when the instrument of 1906 is under consideration. If, in February or March of 1905, Eliza (by guardian) had by proper petition applied to a court of equity for leave to join in the lease it seems to us that the court of equity so applied to, upon a showing of all of the surrounding circumstances as they existed and as they have been hereinabove recited, would readily have granted the application; and if this is so how can a court now, after the fact, after the lapse of the full period of the lease, after the performance by the

lessee of all of the requirements of the lease on its part to be performed, with any propriety cancel the lease? To do so would be to hold in effect that there is no such thing as refusing to cancel an instrument which has been executed by a person mentally incompetent. This lease was for an adequate consideration. All of its terms were fair and reasonable to the lessee and to the lessors. It has been fully performed. It was in the best interests of Eliza and beneficial to her,—fully (657) as beneficial as it could have been if it had been secured and entered into under the careful supervision of a court of equity. There was no fraud, actual or constructive. The imbecility of the lessor did not enter into the transaction. Under these circumstances we can see no equity or justice in canceling the lease.

"The only reason which can be suggested as an equity in aid of canceling the lease and the instrument of 1906 is that by doing so Eliza will now be enabled to collect as rents very much larger sums than she was entitled to under the lease. This is not a good reason nor does it constitute an equity, properly so called, in her behalf." (R. 557-559)

"It is not an equity in her favor that she leased the land for less than its rental value of fifteen or more years later. She leased it in 1905 for all that it was then worth on the market. It would be inequitable to the lessee to permit a lessor, sane or insane, subsequently to cancel a lease on the ground of greater values subsequently developed, acquired and ascertained." (R. 559)

"It is our view of the law that a lease made by an incompetent, who has not been judicially de-

cleared insane, to a lessee without knowledge of the incompetency, for an adequate rental and upon other terms that are reasonable and fair, which is beneficial to the incompetent and is in effect a provision in favor of the incompetent for necessaries for his sustenance and comfort,—a lease which has been fully performed and is accompanied by no fraud or other circumstances of inequity to the incompetent,—should not be canceled,—even though the lessee can be restored to the status quo ante." (R. 560)

It would seem that if there was ever a case where cancellation of an executed conveyance should not be decreed, the 1905 lease falls within that classification.

It has been found—

That the lessee had no notice or knowledge of the incompetence;

That the consideration was adequate;

That the lease was highly beneficial to the incompetent;

That the lessor's relatives and other parties in interest joined in the execution of the lease, and that its terms were proposed by the lessors.

In addition—

The 25-year term of the lease expired before suit was brought to cancel it;

The lessee expended approximately $45,000 in clearing the wild and uncultivated waste, before the first crop could be planted, and had to wait

two years before the first crop could be gathered from one-half of the land.

The lessee expended $182,525.07 in improvements before the 1910 deed was delivered, and $457,073.70[1] thereafter, a grand total of $639,598.77.

What is being sought here is not the cancellation of the 1905 lease, but the cancellation of the lease in so far as Mrs. Christian's interest is concerned, so that from the date of the death of her father, April 10, 1922, until the date of the expiration of the lease on April 1, 1930, she can obtain the rental value of the land in its improved condition, and at its enhanced value, instead of the rental stipulated in the lease.

Mrs. Christian was not the sole party to the lease. She was one of fourteen, and her interest was as to a 1/3 contingent remainder. What she seeks to do here is to retain for her benefit, all the advantages which accrued to her from the existence of the lease during the first 17 years of its 25-year term: and then to repudiate it for its last 8 years so she may secure a higher rental. As the Supreme Court said "Under these circumstances we can see no equity or justice in cancelling the lease." (R. 558)

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1. It is not contended that these were made in reliance on the lease. Those prior to May 2, 1910, were: those thereafter were in reliance on all the interests and titles which Waialua at the time believed it had.

A decree cancelling the lease as to Mrs. Christian would not cancel the 25-year lease; it would merely substitute (as to her interest only) a 17-year lease for a 25-year lease—one which the parties did not make and which the testimony shows, Waialua would have refused to enter into. (R. 1485).

In *Goin v. Cincinnati Realty Co.*, 200 Fed. 252, 254, a minor whose interests in certain real estate were leased for 99 years under authority of court, which lease had an option to purchase at the end of the time upon coming of age, filed a bill in equity to cancel the option provision in the lease,—in other words, to do equity by halves. The court denied relief, saying:

> "Complainant did not in this case attack the lease as an entirety. She only asked to have cut off from it that feature which she considered undesirable. * * * We see no way in which these (the lease and the option) can be considered as two contracts not interdependent. Each part is naturally a consideration for the other part. There is not room to conclude that the lessee would have agreed to pay the stipulated rent unless he had been given the option to purchase. This option is not an after-thought thrown in to make good measure after the bargain was made. It formed one of the mutual conditions negotiated before the application was made to the court. Under familiar rules complainant cannot be heard to attack one part only of an entire contract * * * nor be allowed to ratify in part only so as to get the benefits and avoid the burdens."

6. The 1906 Contract Should not be Cancelled.

If this Court, as we believe it will, refuses to cancel the 1910 deed, the question of the 1906 contract need not be considered. If the 1905 lease is not cancelled, the 1906 contract is only important because by virtue of its ownership, Waialua will not be required to pay the $3,000 annual rent, reserved to Mrs. Christian under the lease.

Having decreed the cancellation of the 1910 deed the Circuit Court of Appeals decreed the cancellation of the 1906 contract, if, on remand, it should be found that Mrs. Christian was incompetent when she executed it. No discussion is had as to the equities surrounding the execution of the agreement, and no attempt is made to restore *status quo*.

The reasons supporting the denial of cancellation of this contract are so fully developed by the Supreme Court in its opinion (R. 572-577) that we will not deal with them at length. That court's discussion shows (1) the agreement was beneficial to Mrs. Christian; (2) Mrs. Christian has been supported under it since 1906, during the first 16 years of which time (up until the death of J. D. Holt, her father), it was uncertain whether anything would ever be received under it by the other party. It is obvious not only that *status quo* cannot be restored, but that it would be highly inequitable and unjust to cancel the instrument,—for under it Mrs. Christian was provided support for 16 years, and it secures her support for the remainder of her life—a thing which in equity is of infinitely more importance than providing additional income for her relatives.

Point III.

THE GRANTOR'S ATTEMPT TO SUSTAIN THE ERRONEOUS DECREE OF THE CIRCUIT COURT OF APPEALS CANCELLING THE 1910 DEED, (ON GROUNDS OTHER THAN THOSE STATED BY THAT COURT) IS WITHOUT MERIT.

In an attempt to sustain the decree of the Circuit Court of Appeals, upon grounds other than those upon which that court based its decision, the grantor's counsel in their brief in opposition to our petition for a writ of certiorari, advance two contentions: (1) that Waialua had notice of the incompetence; (2) that the price was not adequate and Mrs. Christian did not receive it.

We shall deal but briefly with these for they directly challenge the findings of the Supreme Court of Hawaii on the question of notice and adequacy of consideration, and the suggestion that the consideration was not received by Mrs. Christian is negatived by the findings as well as the rulings of the trial court.

This attempt, it should be noted, is confined solely to that portion of the decree which cancelled the 1910 deed. The findings with respect to the 1905 lease are not challenged. The findings of the Supreme Court of Hawaii, as to the lease, as summarized by the Circuit Court of Appeals, were:

> "It found that the company had no knowledge of the incompetency; that the consideration for the lease was adequate; that the bargain was fair and reasonable; that 'there was no fraud, actual or constructive.'" (R. 1608)

1. Waialua Had No Notice of the Incompetence.

It would seem that this question has long since been settled, and that the attempt to claim, on technical grounds, that Waialua had notice when all of the courts have found to the contrary, does not merit extended answer. If there was ever any question on the subject, it was conclusively set at rest by the findings of the lower courts. Certainly if the lower courts had any doubt on the question of notice, they would not have devoted hundreds of pages to opinions on legal questions, that would not even have arisen if Waialua had notice.

The courts below all found that Waialua did not have notice.

The Circuit Court of Appeals said:

> "Both courts found * * * that the company had no notice of the incompetency." (R. 1605)

and quoted the following from the opinion of the Supreme Court of Hawaii:

> "When the W. A. Co. received the deed of Annie Kentwell, of May 2, 1910, it did so, as we have already held, without knowledge of the incompetency of Eliza." (R. 1605)

On the first appeal, the Supreme Court of Hawaii found that Waialua had no notice. (R. 275-276) On the second appeal, that court said:

> "In the case at bar, as already held, while Eliza was an imbecile and mentally incompetent the W. A. Co. had no knowledge of that incompetency at the time that it dealt with her in 1910." (R. 555)

On remand, the trial court interpreted its own earlier decision and that of the Supreme Court of Hawaii as finding that Waialua had no notice and ruled that the issue of notice was no longer before the court, but was foreclosed against the grantor and that the trial would proceed upon the basis that Waialua "acted in ignorance of the actual fact". (R. 1479) Counsel for the grantor made no objection to this ruling, and the trial went forward on that basis.

Notwithstanding these clear and conclusive findings that Waialua had no notice, counsel for the grantor now attempt to charge it with notice by resort to technical arguments.

First it is suggested that the burden was on Waialua to prove lack of notice, and that it failed to do so, and that there is no evidence in the record to sustain the courts' findings. There are many answers to this attempt to challenge the uniform findings of all the lower courts. The weight of authority is that the burden of proving notice is upon the party seeking to avoid the conveyance.[1] In the trial court petitioner not only alleged notice, (R. 87) but assumed the burden of proof, and the trial was had on this basis, thus fore-

1. *Schaps vs. Lehner*, 54 Minn. 208;
Goldberg vs. McCord, 251 N. Y. 28;
In Pfeil's Estate, 287 Pa. 21;
Goldberg vs. West End Homestead Co., 78 N. J. L. 70;
Langdell, A Summary of Equity Pleadings (2d Ed. p. 212).

closing petitioner from urging that the burden was on Waialua.[2]

Finally there is a wealth of evidence, sustaining the finding that Waialua had no notice. Notwithstanding the difficulty of proving a negative twenty years after the event, when all Waialua's representatives were either dead or permanently incapacitated from testifying; the actions of Waialua, at and after the delivery of the deed, the large expenditures which it made upon the faith of the integrity of that instrument, and a thousand other facts and circumstances are so inconsistent with the thought that Waialua had any suspicion of Mrs. Christian's incompetence, that they furnish abundant evidence sustaining the findings of lack of notice.

Second, in the face of the findings below that Waialua had no notice, counsel now ask this Court to find the contrary, contending that Holt had notice and was Waialua's agent. The evidence shows clearly that Holt was not Waialua's agent. None of the courts below held that he was Waialua's agent, and although this contention was strenuously urged upon the Circuit Court of Appeals, it adopted the findings of lack of notice made by the lower courts, thus failing to follow or adopt the grantor's contention. The contention was not even advanced in the Supreme Court of Hawaii. On the contrary, counsel there urged that Holt was Kentwell's agent.

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2. 22 *C. J.* 70; 3 *C. J.* 736; 4 *C. J.* 715;
Spokane Interstate Fair Assn. vs. Fidelity and Deposit Co. of Maryland, 15 F.(2d) 48.

The single transaction in which it is argued that Holt's agency began and ended, was one in which his interests and those of Waialua were wholly adverse, and avowedly so. Waialua refused to buy his interest so long as it was subject to Mrs. Christian's contingent remainder. His acquisition of that contingent remainder was understood by all concerned to be a part and parcel of his offer to Waialua of a two-thirds interest.

Holt dealt with Waialua throughout at arms length. He wanted to sell his share to Waialua, and he knew he could not do this unless he first acquired Mrs. Christian's interest. (R. 1018) Above everything, he wished nothing to interfere with the sale of his own interest. This was recognized by the trial court when it found: "James L. Holt, Lawrence Kentwell, his wife, and John Dominis Holt did everything in their power to represent to the Waialua Company that Eliza was a competent and willing seller, who wished to join in their attempts to sell out." (R. 133)

The suggestion that counsel for Waialua stipulated that Holt was its agent, is without foundation, as a reference to the record will demonstrate. (R. 1061) All counsel did, in an endeavor to facilitate the trial, was to agree that the numerous subsequent conveyances did not put Waialua in any superior position.

But even if Holt had been Waialua's agent (which we deny) his uncommunicated knowledge or opinion concerning the grantor's competence would not be imputable to Waialua.

Whatever knowledge Holt had of Mrs. Christian's incompetence was acquired years before his negotiations with Waialua. Mrs. Christian left Hawaii in 1906, and there is no suggestion that Holt ever saw her again. (R. 146)

All courts agree that such knowledge, acquired by an agent long before the agency was created, will not be imputed to the principal unless it is clearly shown that at the time he acted for his principal the knowledge to be imputed was actively present in his mind; present in such form that he must have been aware that it was significant to the subject matter of the agency, and that it was his duty to communicate it to his principal.[1]

This rule is obviously sound. There is no basis for imputing an agent's prior knowledge to his principal unless it can be said that he was aware of it in a manner and degree that made it his duty to communicate it to his principal.

All of the circumstances lead to the conclusion that Holt did not believe in 1910 that Mrs. Christian was incompetent to dispose of her interest. He had, for years, been trying to buy her interest himself. When he purchased her interest in 1910, he conveyed it to Waialua by a warranty deed.[2] Holt was on friendly

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1. 2 *Mechem on Agency*, (2d Ed.) Sec. 1809;
Constant vs. University, 111 N. Y. 604;
Equitable Securities Co. vs. Sheppard, 78 Miss. 217;
The Distilled Spirits, 11 Wall. 356, 366.

2. Although Holt was insolvent at the time of the trial, he was not so in 1910.

terms with Mrs. Christian and her family group, and her interest had been for sale for years. (R. 1018) Certainly if he had had any real doubt as to her competency he would have arranged for the appointment of a guardian for Mrs. Christian.

Holt testified for the defense on the annulment trial resisting the claim that Mrs. Christian was incompetent (R. 1026) and at the trial of this cause he refused to deny that he had not testified in the annulment proceedings in 1906 that Mrs. Christian "was a bright girl."

Although the trial court found that Holt had knowledge of the incompetence, it is pretty clear that the court found this to be mere constructive knowledge, rather than actual knowledge or belief, for it said: "Lawrence Kentwell and James Lawrence Holt did know the facts which would be notice of this mental incompetency." (R. 158)

It is of course obvious that mere constructive knowledge of the agent acquired before the agency was created is not imputed to the principal: this because the agent could not possibly be conscious of a duty to communicate constructive knowledge (*New England Trust Co. v. Farr*, 57 F.(2d) 103, 110).

Nor is guilty knowledge of an agent ever imputed to an innocent principal who like Waialua cannot be restored to status quo. The rule is stated in the *Restatement of the Law of Agency*, as follows:

"§263. Unless he has changed his position, a principal whose agent has fraudulently acquired property for him, holds it subject to the interests of the defrauded person."

"§274. The knowledge of an agent who acquires property for his principal affects the interests of his principal in the subject-matter to the same extent as if the principal had acquired it with the same knowledge, except where . . . a change in conditions makes it inequitable thus to affect the principal."

Finally, it is appropriate to recall that the whole doctrine of imputed notice "is a dangerous one" (*Allen v. Seckham,* 11 Ch. D. 790); that it "must not be carried to such an extent as to defeat honest purchasers", a limit that has sometimes "been lost sight of" (*Bailey v. Barnes* (1894), 1 Ch. 25).

As stated by Pomeroy:

"The rule of constructive notice through agent to principal, like the doctrine of constructive notice in general, must find its ultimate foundation and only support in motives of policy and expediency. * * * As the doctrine is thus based entirely on motives of policy, it should never in its application transcend the scope and limits of those motives. Whenever its operation in a given state of facts would produce manifest injustice, the courts should, if not absolutely compelled by express authority, withhold such operation. A tendency to restrict the doctrine—to confine it within the limits already established—is clearly exhibited by many of the recent decisions." (1 *Pomeroy's Equity Jurisprudence* (4th ed.) §676.)

And see:

Wittenbrock v. Parker, 102 Cal. 93; 103;
Trentor v. Pothen, 46 Minn. 298;
U. S. v. Detroit Lumber Co., 200 U. S. 321.

2. The Price Paid Was Adequate, and Mrs. Christian Received It.

The Supreme Court of Hawaii, where the question had been extensively briefed and argued, held that the price paid by Waialua was adequate. Although this finding was challenged by counsel for the grantor in the Circuit Court of Appeals, it was not disturbed by that court, which considered and disposed of the case on the basis of the Supreme Court of Hawaii's finding.

The Supreme Court of Hawaii discussed this question at length, and the grounds which it gives in support of its finding are so compelling, that we do not believe the point merits further argument other than to quote from the opinion of that court:

> "Another reason assigned for the cancellation of the deed is that the consideration was inadequate. We cannot agree with this. At the time the deed was signed Eliza's interest was entirely contingent. Whether it ever ripened into an absolute interest depended on her survivorship of her father who was the life tenant. If she predeceased him the fee simple interest upon his death would vest in his heirs at law then living. In this event the Waialua Company would get nothing by its deed nor would it be able to recover the consideration which it had paid. * * * At the time the deed was signed Eliza's father was seventy-one years of age, and while it was unlikely that she would

marry and beget other children, it was not beyond the range of probability that he would adopt children who under the law would also become his heirs. Even, therefore, if Eliza survived him there might be other heirs with whom the fee simple estate would have to be shared. In this event Eliza's interest would be correspondingly diminished, and what the Waialua Company obtained from her would to the same extent be diminished. In 1918 John D. Holt did endeavor to adopt the Kentwell children—six in number—and his effort failed solely for the reason that the proceedings were not in accordance with Hawaiian statutes. (R. 304)

"While the Waialua Company was negotiating for the purchase of Eliza's interest, L. L. McCandless, a man of large financial means and an experienced dealer in agricultural lands in this community, was also endeavoring to purchase it. It is inferable from the evidence that he knew of the Waialua Company's activities and also knew what it had offered. Notwithstanding this he offered the same amount and at no time was his offer increased. This is a strong indication that McCandless considered $30,000 to be all Eliza's interest was then worth. It appears from the testimony of James L. Holt that as far back as 1908 Lawrence Kentwell was trying to dispose of Eliza's interest and there is no evidence that at any time more than $30,000 was offered for it. Prior sales of undivided interests in these same Holt lands tend to show a market value of not exceeding $30,000 for a one-third contingent interest. (R. 305)"

The suggestion was also made that Waialua's conduct was not equitable, because James L. Holt, so it is claimed, received a secret profit. Any support that might be found for this contention disappears in the light of the finding of the Supreme Court of Hawaii that the consideration paid Mrs. Christian for her contingent interest was adequate. The suggestion is also dissipated by the fact that upon the basis of valuation fixed by the Supreme Court, James L. Holt received no more than his fair proportion of the total purchase price of $120,000.

That the parties dealt on this basis is shown by the letter of Colburn dated April 12, 1910 (R. 923), wherein Holt's interests, without Mrs. Christian's interest, were offered for exactly the same price that Holt received after he had, by purchasing Mrs. Christian's interest, combined it with his own. In other words, Holt, by acquiring Mrs. Christian's interest and selling it to Waialua, together with his own, received no greater price for his own interests than the price at which he had been offering his own interests separately. The only possible advantage which accrued to Holt through the acquisition of Mrs. Christian's interest was that it permitted him to sell his own interests to Waialua, as Waialua had always refused to purchase less than the entire two-thirds. (R. 1018)

Mrs. Christian Received the Consideration.

The final suggestion of the grantor's counsel, offered in support of the decree of the Circuit Court of Ap-

peals (but not mentioned by it) is that Mrs. Christian did not receive the $30,000 which Waialua paid.

In the first place there is no question but that $30,000 was paid for Mrs. Christian's interest. The intimation is that, although paid, it was not received or retained by Mrs. Christian personally, but was received and retained by Lawrence Kentwell, who acted as her attorney and agent.

Notwithstanding the inherent difficulty of proving the fact, some twenty years after the event, and after Waialua's agent, Mr. Withington, who made the payment, and Mr. Westacott, the American Consul before whom the deed was signed and payment made, had died, the evidence is abundant that the money was paid to Mrs. Christian.

The deed itself, executed by Mrs. Christian, acknowledges the receipt of the consideration by her. (R. 27) This, without more, is proof of payment (13 C. J. p. 760).

The reputation of Mr. Withington, both as to integrity and professional attainments, is unquestioned. (R. 276) That he was meticulous in his attention to detail is demonstrated by his cables and letters, which were contemporaneous with the transaction.

In his letter to Professor John Chipman Gray (R. 928) Mr. Withington states that it is proposed to purchase Mrs. Christian's interest for $30,000. The cable of April 28, 1910 to Mr. Withington authorized him to pay Mrs. Christian $30,000 (R. 940) and upon his

return to America, he reported by letter to his law firm that he had "paid Eliza Holt Christian $30,000 at 4.88½, £6141.5" (R. 940), and he enclosed with his letter reporting the transaction the memorandum of The Canadian Bank of Commerce, London, which was the bank issuing the drafts to the grantors, which memorandum read:

"$30000@488½=£6141— 5- 0
5000@ do =£1023—10-10
Cash . 45— 4- 2
£7210

Also with the letter was an undated slip of The Canadian Bank of Commerce, London, with the following in longhand 'Mrs. Annie Holt Kentwell 5,000, Mrs. Eliza R. P. Christian 30,000.'" (R. 947)

This evidence is corroborated by the deposition of Annie Kentwell, who says that payment was by "check" (R. 1178). The memoranda quoted above, as well as almost universal business practice, call for the conclusion that the draft named Mrs. Christian as payee. Unless her indorsement was forged (which is not suggested), discharge of the instrument was payment to her.

Upon this state of the record the trial court found:

"14. That Waialua Company did pay $30,000 in cash on May 2, 1910 to those who then had and continued to have charge of petitioner and the responsibility for maintenance of petitioner and who continued to maintain petitioner.

"15. That the persons who would have knowledge of the uses made of said moneys and the benefit, if any derived by petitioner, are the persons who are substantially discredited in this court as witnesses.

"16. That it would be inequitable to require respondent Waialua Company to show from such witnesses what actually became of the money and its benefits." (R. 159)

While it is true that the Supreme Court of Hawaii (R. 301) discusses this question and concludes by inference that Mrs. Christian did not receive the payment, it seems clear that what the court really questions is whether, after the purchase price was paid, Mrs. Christian retained it: not the receipt of the money but its application. The only evidence on this question is Annie Kentwell's testimony that Mrs. Christian had no bank account and that "so far as my knowledge goes," Mrs. Christian "had no sum of money since the execution of the document" (R. 1179). But this, obviously, is perfectly consistent with the money's having been used or invested for her benefit; and fraud or theft will not be presumed.

We submit that the conclusions and reasoning of the trial court are eminently sound, and that not only does the evidence show the payment to Mrs. Christian, but that it would be highly inequitable to require any higher standard of proof as to this transaction of more than 20 years ago or require Waialua not only to prove the payment but to prove what became of the

money after it was paid. This is further confirmed by the fact that during the course of the trial, when the question of introducing additional evidence as to what had become of the money after it was paid was raised, the trial judge excluded such evidence, ruling that it was immaterial "as to just which one of the group received the money at the time it was paid". (R. 1344)

CONCLUSION

We are dealing here with a question which affects the security of every title to land in Hawaii. It is contended that an inexorable rule of the federal courts makes transactions entered into by an innocent party with an incompetent void, and this by the mechanical application of a metaphysical rule. We have shown that the rule of law which found expression in the decree appealed from is supported by neither nor equity. In this field of the law, certainty and security of transactions are essential;

> "Such rules may be and ought to be of general and absolute application." (*Pound, Law & Morals,* p. 71)

Here, as nowhere else, the law must display a conspicious measure of "certainty and order". (*Cardozo, The Growth of the Law,* p. 82), and should subordinate "the equity of a particular situation to the overmastering need of certainty in the transactions of commercial life". (*Cardozo,* op. cit. 110)

It is submitted that the decree appealed from should be reversed and that the cause be remanded with directions to dismiss the bill.

Respectfully submitted,

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ROBERTSON, CASTLE AND ANTHONY,
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EVAN HAYNES,
Of Counsel.

Dated, San Francisco, California,
September 14, 1938.

MAP OF

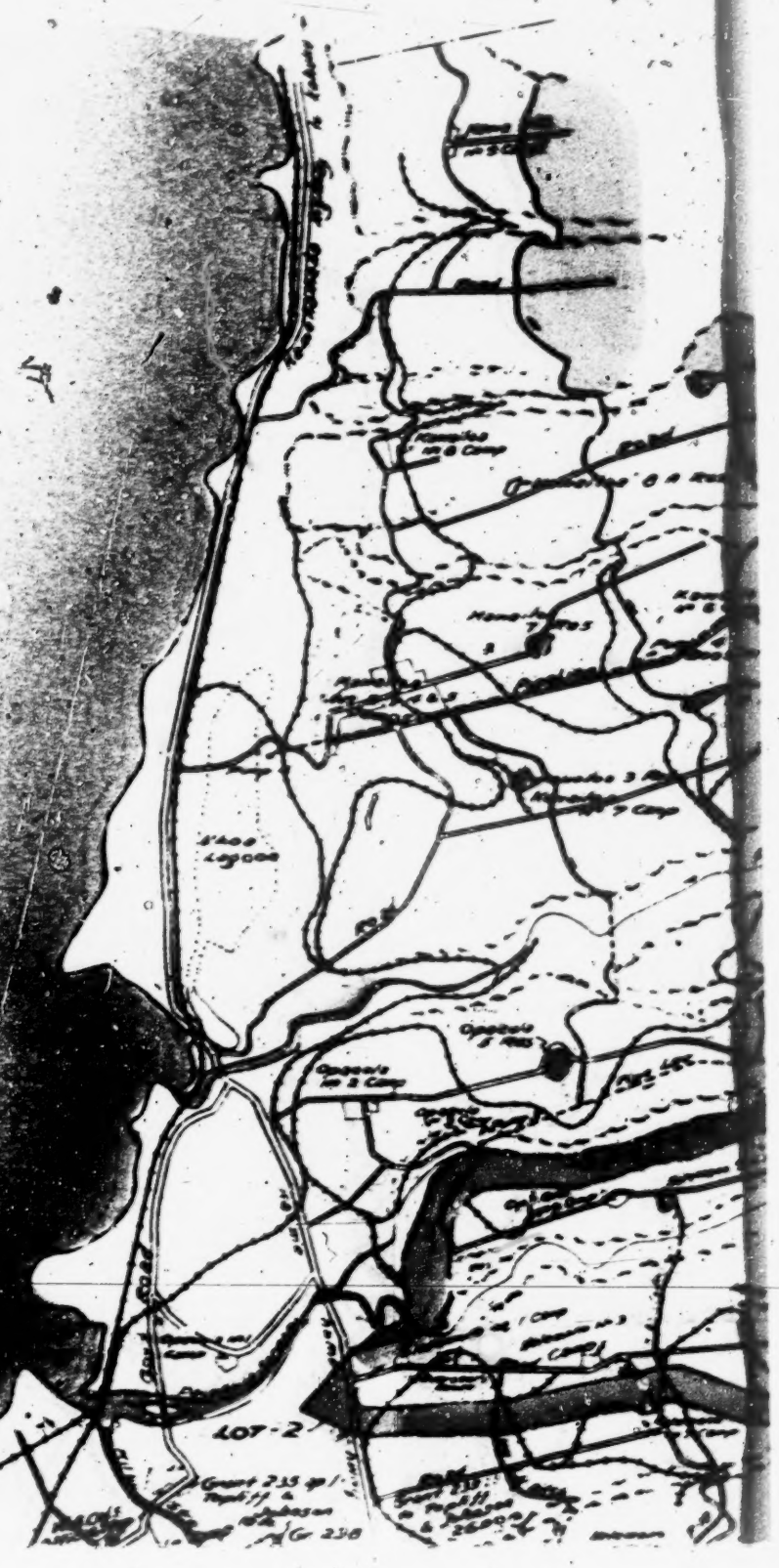
WAIALUA AGRICULTURAL CO., LTD. PLANTATION

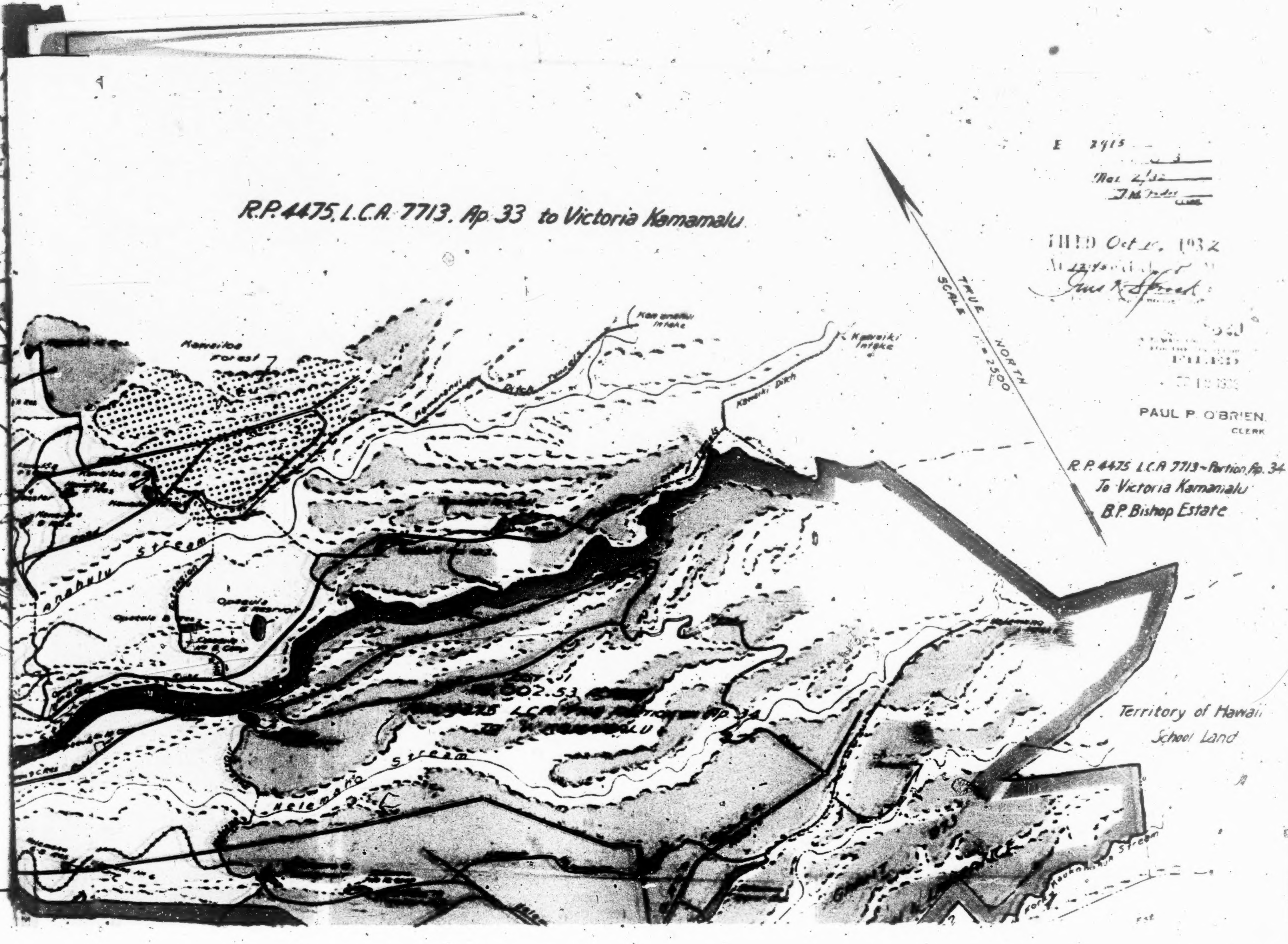
WAIALUA, OAHU. T.H.

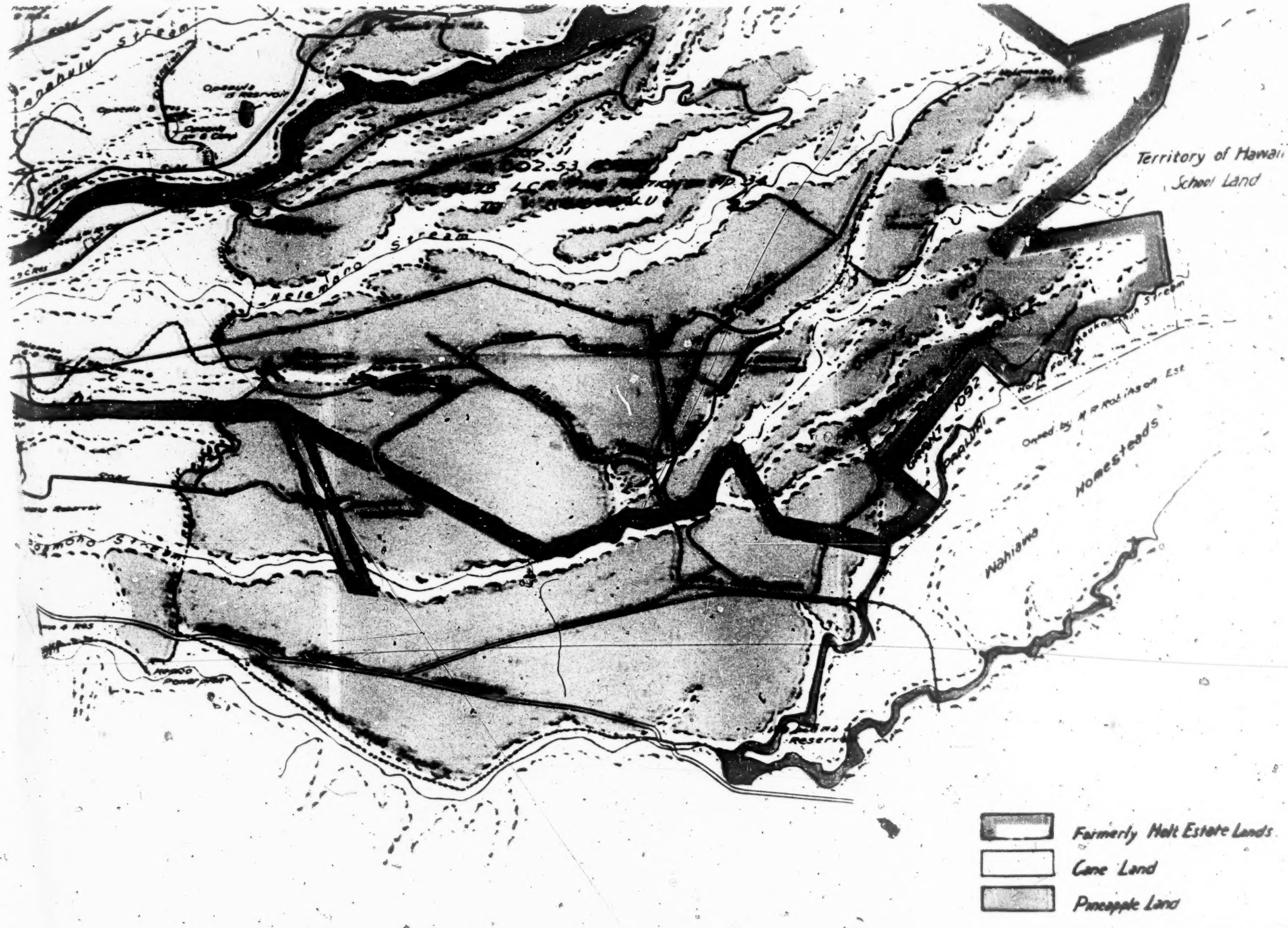
Feb. 1. 1932.

Scale : 1 inch = 2500 ft.

Compiled and reduced from map of W.A.Co.Ltd. Plantation dated 1902
Scale 1" = 1000 J.G.Duarte - Surveyor
By C.H. Bischoff - Surveyor, W.A.Co.Ltd.




R.P. 4475. L.C.A. 7713. Ap. 33 to Victoria Kamamalu
TRUE NORTH
PAUL P. O'BRIEN
CLERK
R.P. 4475 L.C.A. 7713 - Portion Ap. 34
To Victoria Kamamalu
B.P. Bishop Estate
Territory of Hawaii
School Land
Kawailoa
Forest
Kawaiki Ditch
Kawaiki Intake
Stream
Helemano Stream


Territory of Hawaii
School Land
Owned by H P Robinson Est
Homesteads
Nahiawa
Formerly Halt Estate Lands
Cane Land
Pineapple Land